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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN F. KNIGHT, JR.,
and ALEASE S. SIMS, ET AL.,

Petitioners,

v.

THE STATE OF ALABAMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where both lower courts found provisions in Alabama's constitution to be racially discriminatory in both their original purpose and in their current effects, did the courts err by denying all relief and upholding these racially discriminatory provisions?

2. Is the decision below contrary to the holding of this Court in *United States v. Fordice*, 505 U.S. 717 (1992), that a state must eradicate vestiges of *de jure* racial segregation from its system of higher education?

3. Is the decision below contrary to the holding of this Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), that provisions in a state's constitution that continue to have their intended racially discriminatory effects must be struck down as a violation of the Fourteenth Amendment?

LIST OF PARTIES

Petitioners:

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Respondents:

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Bob Riley, Governor of Alabama

The Alabama Public School and College Authority and its members:

James Allen Main, State Finance Director
Dr. Joe Morton, State Superintendent of Education

The Alabama Commission on Higher Education and its members:

J.R. Brooks
Thomas P. Davis
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Additional Parties To The Proceedings Below:

The following parties in the District Court filed briefs in the Court of Appeals in support of the Knight-Sims plaintiffs-petitioners, but on motion of the appellee State of Alabama the Court of Appeals struck their briefs. Petitioners are treating them as respondents:

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The Board of Trustees for Alabama State University and its members:

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The following parties in the District Court filed appearances in the Court of Appeals but did not file a brief in the appeal, and petitioners believe that they have no interest in the outcome of the petition:

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The following parties in the District Court did not file an appearance in the Court of Appeals, and petitioners believe that they have no interest in the outcome of the petition:

United States of America

The Board of Trustees of Auburn University and its members:

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Samuel Ginn
Earlon McWhorter
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The Board of Trustees for Troy University and its members:

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Joe Hutto

The University of West Alabama

The University of Montevallo

The University of North Alabama

The University of South Alabama

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they are natural persons and have no parent companies nor non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the three-judge panel of the United States Court of Appeals for the Eleventh Circuit is reported at 476 F.3d 1219 and is reprinted in the Appendix hereto ("App.") at App. 1. That opinion affirmed the October 5, 2004, opinion and order of the United States District Court for the Northern District of Alabama, which is reported at 458 F.Supp.2d 1273 and is reprinted at App. 25, and the February 10, 2005, order of the District Court denying plaintiffs' motion to alter or amend the judgment, which is reprinted at App. 103.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 2007. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; Title VI, § 601, of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the challenged provisions of the 1901 Constitution of Alabama, as amended, are set forth at App. 109-127.

STATEMENT OF THE CASE

In this action, the Alabama higher education desegregation case, the plaintiff class of all black citizens of Alabama moved for additional relief with respect to the property tax system that partly funds public education. After the District Court conducted a trial on the merits, it entered extensive findings of fact that provisions in the Alabama Constitution of 1901, as amended, which restrict the ability of state and local governments to raise ad valorem taxes were adopted for the racially discriminatory purpose of denying blacks equal funding for education and that they still have their intended discriminatory effects. App. 34-68. However, the District Court refused to hold that these racially motivated provisions violate the Fourteenth Amendment either under the desegregation standards of *United States v. Fordice*, 505 U.S. 717 (1992), or under the generally applicable equal protection standards of *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Hunter v. Underwood*, 471 U.S. 222 (1985). The Eleventh Circuit panel affirmed, holding that state revenue laws are categorically not policies governing higher education and that the District Court properly declined to address the *Hunter v. Underwood* violation notwithstanding the mandate of Rule 54(c), Fed.R.Civ.P.

A. The Procedural Background.

This challenge to the racially discriminatory property tax provisions in the Alabama constitution arose during the period of the District Court's retained jurisdiction over Remedial Decrees it had entered in 1991 and 1995. *Knight v. Alabama,* 787 F.Supp. 1030 (N.D. Ala. 1991), *aff'd in part and rev'd in part*, 14 F.3d 1534 (11th Cir. 1994), *on remand*, 900 F.Supp. 272 (N.D. Ala. 1995). The District

Court's 1991 opinion included an 88-page review of Alabama's history of official denial to African Americans of equal access to public education, from the State's admission to the Union in 1819 through the Civil Rights Era in the 1960s and 1970s. 787 F.Supp. at 1065-1153. The 1991 Remedial Decree included a general injunction against continued maintenance of vestiges of segregation in Alabama's system of higher education and ordered specific relief in several areas involving both the historically white institutions ("HWIs") and the historically black institutions ("HBIs"). 787 F.Supp. at 1377-80.

The class plaintiffs appealed, contending that the 1991 Remedial Decree did not go far enough, and in 1994 the Eleventh Circuit remanded the case for further consideration. 14 F.3d 1534 (11th Cir. 1994). However, the Court of Appeals affirmed the District Court's fact-finding and praised it for having anticipated the standards enunciated in *United States v. Fordice* by tracing current policies to historical *de jure* racial discrimination. 14 F.3d at 1540. After another trial on remand, the District Court entered its 1995 opinion and Remedial Decree, ordering additional programs and funding for the HBIs, including scholarships to attract non-black students to the HBIs. 900 F.Supp. at 349-73. The District Court retained jurisdiction for ten years to monitor implementation of the 1995 Remedial Decree. *Id.* at 374.

B. Proceedings In the District Court On the Property Tax Issues.

After 1995 Alabama, like the rest of the nation, experienced sharp increases in the cost of attending public universities, and in 2003 the class plaintiffs sought

additional relief, contending that racially motivated restrictions in the state constitution were contributing to rising tuition and declining financial aid that adversely affected access to higher education for black Alabamians. App. 29-33. The state constitutional provisions in question are sections of the original Alabama Constitution of 1901, which cap property tax millage rates, and two "Lid Bill" constitutional amendments procured by Governor George C. Wallace in the 1970s that drastically reduce the percentage of fair market value to which the millage rates can be applied, restrict the valuation of farm and timber land to their current use, and place a "lid" on total ad valorem taxes. App. 31-32. The District Court rejected the defendant State's argument that the motion for additional relief came too late or was barred by law of the case or res judicata. Doc. 3252 at 1-2. It held a two-day trial, at which the class plaintiffs and the defendant State presented expert and lay testimony and extensive documentary evidence. App. 34.

On October 5, 2004, the District Court issued its written opinion and order. App. 25. It made detailed findings of fact, tracing a series of state constitutional provisions and amendments all the way back to white resentment over demise of the pre-Civil War slave tax, App. 34-68. It summarized all these findings:

> There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. . . . The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the

> amendments to it in 1971 and 1978. . . . Indeed, Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.

App. 65-66. The District Court then found that these state constitutional provisions still have their intended racially discriminatory effects, keeping Alabama's property taxes far below those of all other states, starving predominately black school systems of local revenues, and depleting higher education's portion of the state sales and income taxes that must be shared with K-12 schools. App. 68-93.

> [T]he underfunding of public education in Alabama, the resulting rising tuition and fees at its public universities, and the declining or disappearing availability of need-based state and institutional financial aid seriously impact black Alabamians in particular, as well as other low and middle income students, making it increasingly more difficult for those students to have access to enrollment in and completion of higher education.

App. 87.

In its conclusions of law, the District Court held that plaintiffs had satisfied the first part of the *Fordice* standard, "inasmuch as the constitutional provisions governing the taxation of property are traceable to, rooted in, and have their antecedents in an original segregative, discriminatory policy." App. 96. But, notwithstanding its specific fact findings to the contrary, the District Court concluded that, because property taxes fund K-12 schools, the State had satisfied its burden under the second part of the *Fordice* standard of showing that the challenged tax

provisions have no segregative effect on students' choice to attend higher education. App. 97-98. It went on to conclude that the racially discriminatory provisions do not violate the Fourteenth Amendment under the principles enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), App. 99-102, and it "decline[d]" to apply the Fourteenth Amendment standard of *Hunter v. Underwood*, 471 U.S. 222 (1985), to the facts it found, agreeing with the State that the injunctive relief called for by *Hunter v. Underwood* exceeds the scope of an action involving desegregation of higher education. App. 105-06.

C. The Court of Appeals' Decision.

The Eleventh Circuit affirmed, holding categorically that tax policies are not subject to review under *Fordice*.

> The segregative policies proscribed by *Fordice* govern *higher education,* not *revenue raising*. The property tax policies plaintiffs now challenge, however, are revenue policies; they are *not* policies that "govern higher education" as contemplated by *Fordice*. The challenged tax policies have nothing to do with admissions, faculty and administration, availability of degree programs, student recruitment, education facilities or any other aspects of higher education that *Fordice* recognized may discourage black students from attending historically white institutions and white students from attending historically black institutions. They are not, therefore, the sort of *education* policies that *Fordice* recognized could perpetuate racial identifiability in higher education.

App. 14 (emphases in original). In the alternative, the Eleventh Circuit affirmed the District Court's conclusion that the causal relationship between the racially

discriminatory tax provisions and current segregation in higher education is too attenuated. App. 14-17. Finally, the Court of Appeals ruled that the District Court properly exercised discretion under Rule 54(c), Fed.R.Civ.P., when it declined to consider, under the principles of *Hunter v. Underwood*, the Fourteenth Amendment violations established by its findings of fact. App. 19-21 n.19.[1]

REASONS FOR GRANTING THE PETITION

The District Court made findings of fact that unquestionably establish a violation of the Equal Protection Clause, but it refused to provide any relief. The Eleventh Circuit agreed that the racially discriminatory state constitutional provisions could not be challenged in this case. These decisions are squarely contrary to the duty this Court has imposed on the federal judiciary to root out and enjoin state laws and policies that have a racially discriminatory purpose and effect. Unless these errors are corrected by this Court, the racially motivated provisions of Alabama's constitution left standing by the lower courts will allow to continue for generations to come the revenue policies that for over a century have blocked black students' equal access to all levels of public education. The skyrocketing cost of attending and completing college has become a national crisis that is being addressed in

[1] On December 12, 2006, the District Court approved over one dozen consent decrees that will bring most of this longstanding desegregation action to an end. *Knight v. Alabama*, 469 F.Supp.2d 1016 (N.D. Ala. 2006). The single issue not resolved by these recent consent decrees is the one presented in this petition, the constitutionality of racially motivated revenue provisions in the Alabama constitution. See CA No. 2:83-cv-01676-HLM (N.D. Ala.), Doc. 3469.

Congress, in the states, and in the media. Here the lower courts have left in place racially discriminatory state constitutional restrictions that, the District Court found, will continue to prevent Alabama from being able to respond to this crisis in any effective way. This is not a mere misapplication of governing law to found facts. The resulting injury done to the plaintiff class of all black Alabamians could not be more grievous and irreparable, perpetuating, as the District Court acknowledged, "the state's historical official policies of forcing African Americans into subordinate social and economic roles in the state's civil life." App. 91-92.

I. The Courts Below Decided Federal Questions of Great Constitutional Importance In a Way That Conflicts With All the Decisions of This Court Addressing Findings of Purposeful Racial Discrimination By a State.

A. The Court of Appeals Erred When It Held That State Revenue Policies That Continue To Have Their Intended Effect of Denying African Americans Equal Access To All Levels of Public Education Are Not "Segregative Policies Proscribed by *Fordice*."

The Court of Appeals fundamentally misinterpreted this Court's constitutional standards governing a state's duty to eradicate policies that perpetuate *de jure* segregation when it categorically excluded tax provisions from policies that may be challenged under *United States v. Fordice*, 505 U.S. 717 (1992). This constricted view of what constitutes unconstitutional policies perpetuating *de jure* segregation in higher education finds no support in *Fordice* and conflicts with other decisions of this Court

addressing revenue laws in the context of school desegregation.

Fordice instructs federal courts to examine "a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in *any facet* of its institutional system," 505 U.S. at 728 (citations omitted) (emphasis added). The factors that must be examined are not limited, as the Court of Appeals thought, to policies encouraging whites to attend only white colleges and blacks to attend only black colleges. App. 14. They include racially discriminatory state actions that impede "a student's decision to seek higher education" at any state institution. 505 U.S. at 729. The vestiges of segregation will have been removed only "when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend." *Id.* (*quoting Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir. 1990)).

Fordice explicitly warns lower courts not to limit their scrutiny of state policies to the particular policies addressed in its opinion.

> It is important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior *de jure* system. In highlighting, as we do below, certain remnants of the prior system that are readily apparent from the findings of fact made by the District Court and affirmed by the Court of Appeals, we by no means suggest that the Court of Appeals need not examine, in light of the proper standard, each of the other policies now governing the State's university system that have been challenged or that are challenged on

> remand in light of the standard that we articulate today.

505 U.S. at 733 (footnote omitted). The Eleventh Circuit simply ignored this admonition and held that the property tax provisions in Alabama's constitution were not among those policies "that *Fordice* recognized," and thus they were not policies "governing" higher education. App. 14.

This Court has emphasized "the constitutional importance" of challenges to state tax policies that impede the ability of black students to attend fully desegregated schools, "one of the most serious injuries recognized in our legal system." *Allen v. Wright*, 468 U.S. 737, 756 (1984). The plaintiffs in *Allen* were found to lack standing, however, to challenge certain IRS tax exemptions to racially exclusive private schools, "because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful." *Id.* at 757. By contrast, in the instant case, the Court of Appeals accepted the District Court's findings of fact that the challenged state tax policies are directly traceable "to segregative purposes and [were adopted] with discriminatory intent." App. 13-14.

The circumstances in this case are analytically similar to those in *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964), where this Court upheld a District Court injunction prohibiting county authorities from perpetuating school segregation by allowing tax credits for contributions to private schools attended by whites. The tax credits were "essential parts of the county's program" to deny black students equal educational opportunities. *Id.* at 233. Likewise, in the instant action, the District Court has made fact findings that essential parts of Alabama's historical program of school

segregation have been various state constitutional restrictions that, like tax credits, shield white property owners from being taxed to educate blacks.

This Court recently cited *Griffin* as an example of those situations in which the Tax Injunction Act, 29 U.S.C. § 1341, does not bar third party suits challenging tax benefits provided for unconstitutional purposes:

> It is hardly ancient history that States, once bent on maintaining racial segregation in public schools, and allocating resources disproportionately to benefit white students to the detriment of black students, fastened on tuition grants and tax credits as a promising means to circumvent *Brown v. Board of Education,* 347 U.S. 483 (1954). The federal courts, this Court among them, adjudicated the ensuing challenges, instituted under 42 U.S.C. § 1983, and upheld the Constitution's equal protection requirement.

Hibbs v. Winn, 542 U.S. 88, 93 (2004) (citations omitted).

State revenue policies arguably are even more relevant in the context of higher education desegregation than they are in elementary-secondary desegregation cases. As this Court noted in *Fordice*, public higher education is neither compulsory nor free, and federal courts may not require prior *de jure* states to provide higher education without cost or to assign students to colleges. 505 U.S. at 728-29. Rather, the state's constitutional obligation is to remove state obstacles to students' choice to attend and to complete higher education. *Id.* at 729. As the District Court here found in 1995, tuition, costs, and financial aid head the list of factors that influence student choice, *Knight v. Alabama*, 900 F.Supp. at 283, and these cost factors are direct functions of state revenue policies. Every

one of the educational policies cited by the Court of Appeals, admissions, faculty and administration, degree programs, student recruitment and facilities, App. 14, depends upon state revenues and appropriations to its system of higher education.

B. The Findings of Fact Showing a Direct, But-for Causal Connection Between the Challenged Revenue Provisions and the Denial of Equal Financial Access To Higher Education Undercut the Lower Courts' Conclusion That This Relationship Is Too Attenuated.

Alabama has always funded the higher education it afforded blacks from the same revenues that fund K-12 schools. *Knight v. Alabama*, 787 F.Supp. at 1081-89. When property tax revenues were diverted from black schools to white schools, the historically black colleges "which were funded out of the common school fund, suffered this deprivation along with black elementary and secondary schools. . . ." *Id.* at 1091. In fact, before 1935 even the historically white colleges were funded from the state property tax. App. 46. Since 1935, when the Education Trust Fund (ETF) was created, all levels of public education in Alabama have received their primary funding from state sales taxes and income taxes. App. 45-46. To compensate K-12 schools for their lack of local property tax revenues, the higher education share of the ETF has fallen from 84% of need to 55% since 1990, causing tuition to triple and financial aid to shrink. App. 83, 85, 88-89. "The trend of rapidly increasing tuition and steadily decreasing need-based financial aid in Alabama corresponds with a growing gap between white and black Alabama high school

graduates enrolling in the state's public four-year institutions of higher education." App. 90.

These findings of fact establish a direct, not an attenuated, causal relationship between the racially discriminatory property tax restrictions and black students' financial access to attending and completing higher education. There is no mention in *Fordice* of a tenuous causal connection being a factor limiting the state's constitutional obligation to eliminate all vestiges of *de jure* segregation from its system of higher education. In elementary-secondary school desegregation cases this Court has required plaintiffs to show that the causal relationship between past segregative state action and the current policy or practice that allegedly perpetuates segregation is not attenuated. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 211 (1973). But the attenuation these desegregation cases refer to are findings of fact that the injury complained of "was the result of private decision-making and economics. . . ." *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 243 (1991); *accord, Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (racial imbalances in schools resulted from "fundamental changes in demographics, changes not attributable to the former *de jure* regime or any later actions by school officials").

In the instant case, there are no findings that the growing financial barriers to blacks' access to higher education are caused by private third parties rather than by the state's intentionally segregative actions. To the contrary, the District Court found that the millage caps and Lid Bill amendments are direct, but-for causes of the inability of both state and local governments to raise revenues sufficient to fund both K-12 and higher

education. App. 72, 96. It went on to find that the resulting lack of funding adversely impacts black students, first denying them academic resources and preparation for college work and then drastically increasing the cost of higher education and reducing the appropriations for financial aid. App. 72-93. There is nothing tenuous about this causal connection between state action and harm to the plaintiff class.

The Court of Appeals erred in thinking "that there are simply far *too many links in this chain* to permit us to infer that Alabama's method of funding its K-12 education causes, in any meaningful way, the continuing segregation of its colleges and universities." App. 15 (emphasis added). Both lower courts overlooked the controlling fact that all these links in the chain are caused by state action, not by intervening private actors or demographics, which are the only factors this Court has held can create the kind of attenuation that relieves the state of its constitutional obligation to eliminate all vestiges of *de jure* segregation "root and branch." *Green v. School Bd. of New Kent County,* 391 U.S. 430, 437-38 (1968). So long as the chain of causation is within the state's control, there is no principled limitation on its remedial duty due to the number of branches or to the depth of the roots.

The Court of Appeals also misapplied this Court's desegregation jurisprudence when it held that the relationship between state constitutional barriers on property taxes and denial of equal access to higher education is too attenuated because the effectiveness of judicial relief would be speculative and unpredictable. App. 15-16. There are no guarantees, it said, that, once the constitutional restrictions are removed, state and local governments will take advantage of the opportunity to raise property taxes,

or that they will not reduce education revenues from other sources, or that they will provide additional education funding needed to improve K-12 schooling and to lower the costs of attending college. *Id.* This reasoning overlooks the basic principle of *Fordice* that, although federal courts may not force states to open wide the doors of higher education or even to operate any system of free public education, they must order states formerly practicing *de jure* school segregation to reform to the extent practicable and educationally sound all of its current education policies that are rooted in segregation and that still have segregative effects. There is no doubt that the challenged restrictions in the Alabama constitution prevent state and local governments from even considering the reforms the Court of Appeals is not sure they will undertake. The District Court made findings that these provisions "are the primary force driving" the injustices of Alabama's revenue system, App. 68, that "inadequate property taxes cause Alabama's inadequate revenues," App. 69, and that removing these discriminatory provisions from the state constitution is "a critical and necessary step" toward any effort to provide adequate funding for Alabama's system of public education. App. 81. Uncertainty about what reforms, if any, will take shape in the future cannot justify judicial inaction that guarantees reform can never begin.[2]

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[2] The Court of Appeals simply got wrong other alleged facts that are not in the District Court's findings. None of the remedial decrees in this action was "agreed to by the parties," App. 22; they were all adjudicated by the court after long, hotly contested trial proceedings. The diversity scholarships the Court of Appeals refers to did not benefit black students. They were restricted by the District Court to non-black students attending the two historically black universities, Alabama State University and Alabama A&M University, and thus provided no financial help to black students. 900 F.Supp. at 356-58. Similarly,

(Continued on following page)

II. A Federal Court That Finds Facts Establishing an Incontrovertible Fourteenth Amendment Violation May Not Decline To Grant Any Relief Solely Because the Subject Matter Is Broader Than, Though It Includes, the Issues Raised in the Complaint.

The Court of Appeals held that the District Court justifiably refused to enjoin future enforcement of the intentionally racially discriminatory property tax restrictions in the Alabama constitution, because such a prohibitory injunction would impact not only higher education but many other state and local governmental functions. App. 19-21 n.19. The plaintiffs had "set the agenda of the lawsuit," according to the Court of Appeals, and the requested injunction would "expand our authority beyond this 'case or controversy' to the general 'doing of justice' that plaintiffs appear to believe to be our statutory mandate." *Id.* This holding squarely conflicts with the plain language of Rule 54(c), Fed.R.Civ.P., "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," and with this Court's admonition "that a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1978).

As *Fordice* notes, even those discriminatory state policies that for some reason do not fit within its higher

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proceeds from the endowment trusts the District Court created for ASU and AAMU are restricted to merit-based scholarships that the court hoped would help attract other-race students. They are not a source of need-based financial aid for black students. App. 349.

education desegregation framework may still be challenged under "traditional" Fourteenth Amendment principles. 505 U.S. at 732 n.6 (*citing Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 250-251 (1991); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977)). The District Court erroneously declined to consider the close match between its findings of fact and those in *Hunter v. Underwood*, 471 U.S. 222 (1985), in which this Court struck down provisions in Alabama's 1901 Constitution that were intended to disqualify blacks from voting. This Court noted that "zeal for white supremacy ran rampant at the [1901 constitutional] convention," and it credited the testimony of expert historians that the challenged provision was "enacted with the intent of disenfranchising blacks." 471 U.S. at 229. It affirmed the view that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but-for' motivation for the enactment of § 182." *Id.* at 232. It rejected Alabama's argument that events during the 80 intervening years had legitimated the provision, because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights.*" *Id.* at 233.

The Court of Appeals refused to assess the fact findings by any of these "traditional" standards solely because it thought that these findings appear in the wrong case. App. 19-22 n.19. But Rule 54(c) not only empowers federal courts to afford remedies for violations established by the facts, its unequivocal command compels them to do so.

In short, the District Court below failed to carry out the duty this Court has imposed on the federal judiciary to provide relief to plaintiff victims of unconstitutional racial discrimination against the constitutional violator identified by the court's own findings of fact. The reprehensibleness of the violation and the grievous injury it has caused and will continue to cause for the indefinite future could hardly be any greater.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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476 F.3d 1219

United States Court of Appeals, Eleventh Circuit.

John F. KNIGHT, Jr., et al.,
Intervenor-Plaintiffs-Appellants,

v.

ALABAMA, State of, Alabama A & M University (AAMU), Alabama State Board of Education,
Defendants-Appellees.

No. 05-11527.

Jan. 31, 2007.

James U. Blacksher, Birmingham, AL, for Appellants.

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Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON, Chief Judge, and HILL and KRAVITCH, Circuit Judges.

HILL, Circuit Judge:

Plaintiffs claim that certain tax provisions of the Alabama Constitution violate the United States Constitution. They assert that these tax provisions so seriously underfund public education in Alabama that they have a segregative effect on Alabama's colleges and universities. The district court denied the claim, and this appeal followed.

I.

This case was filed in 1981, claiming that the State of Alabama had failed to complete the desegregation of its colleges and universities.[1] Plaintiffs alleged that many of Alabama's polices governing higher education tended to perpetuate its formerly *de jure* segregated university system. The challenged education policies included: admissions standards at historically white institutions, claimed to disqualify disproportionate numbers of black applicants; selection procedures for the governing boards, administrations and faculty of historically white institutions, claimed to result in the under representation of blacks; curriculum policies at historically white institutions, claimed to include little representation of black history, thought, or culture; campus environments at

[1] The United States Department of Education informed Governor Fob James and the various university presidents that there were vestiges of a prior *de jure* segregated system of higher education in Alabama. After several months of unsuccessful negotiations, the Justice Department filed this suit. Defendants included the State, the Commission on Higher Education, the State Public School and College Authority, and ten historically white educational institutions. A class of private plaintiffs, represented by John F. Knight, and other named plaintiffs who had previously filed a separate suit, was permitted to intervene.

historically white institutions, claimed to be hostile to blacks; funding and facility policies governing historically black institutions, claimed to result in their inadequacy; duplication of programs at both historically white and historically black institutions, claimed to result in racial separation; and restrictive institutional missions at historically black institutions, claimed to result in the absence of graduate and other desirable programs at those institutions.[2] Plaintiffs sought change in these policies that would tend to decrease the *de facto* segregation, or racial identifiability, of Alabama's colleges and universities.

In 1991, following two bench trials that lasted over seven months, during which the court heard approximately 200 witnesses and received hundreds of thousands of pages of exhibits, the district court issued a 360-page opinion in which it found liability. *Knight v. Alabama,* 787 F.Supp. 1030 (N.D.Ala.1991) ("*Knight I*"). The court found that several of Alabama's higher education policies, including those governing faculty and administrative employment, allocation of funds and facilities at historically black institutions, admissions at historically white institutions, and program duplication did tend to result in the racial identifiability of its colleges and universities. *Id.* at 1368. The court ordered the parties to develop and the State to implement specific modifications to these policies in order to increase black access to historically white institutions and encourage white attendance at historically black institutions. *Id.* at 1377-82.

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[2] For a detailed summary of plaintiffs' contentions and those of the other parties, *see Knight v. Alabama,* 787 F.Supp. 1030, 1051-61 (N.D.Ala.1991) ("*Knight I*").

Just six months after the district court entered its judgment in *Knight I,* the Supreme Court decided *United States v. Fordice,* 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992), the first case in which the Court enunciated the constitutional standards governing claims of persistent segregation in higher education. In *Fordice,* the court made clear that even race-neutral "policies now governing the State's university system" may violate the Fourteenth Amendment. 505 U.S. at 733, 112 S.Ct. 2727. In order to successfully challenge such policies, the Court said, plaintiffs must demonstrate that they are traceable to the State's prior *de jure* system of segregation in higher education. *Id.* Having done so, the burden shifts to the State to prove that these policies do not have a continuing segregative effect. *Id.* at 738-39, 112 S.Ct. 2727.[3] Failure of the State to do so authorizes the court to find liability and issue remedial orders. *Id.*

A few months later, *Knight I* reached us on appeal, and we reviewed the district court's judgment under the newly-established *Fordice* standards. We were impressed with the extent to which the district court had anticipated those standards, and we acknowledged this prescience, affirming most of the judgment and remanding only for a limited review of a few discrete elements of it. *Knight v. Alabama,* 14 F.3d 1534, 1540 (11th Cir.1994).

On remand, and prior to any proceedings, the district court took the extraordinary step of appointing five neutral expert witnesses to assist it in fashioning a constructive

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[3] If the State is unable to show that the challenged policy has no continuing segregative effects, the State may nevertheless escape liability if "the State show[s] that there are no less segregative alternatives which are practicable and educationally sound." *Id.* at 743.

remedial decree.[4] These experts reviewed the policies found to perpetuate segregation in Alabama's colleges and universities and recommended changes to reduce racial separation in the system.

Then, in 1995, the court entered its remedial decree. The court ordered numerous changes in Alabama's higher education policies, including less duplication of programs at geographically close institutions; strengthened curricula at historically black institutions; increased integration of administration and faculty at all institutions; more flexible admissions policies; increased black student recruitment; and increased funding of historically black institutions. *Knight v. Alabama,* 900 F.Supp. 272 (N.D.Ala.1995) ("*Knight II*").

Additionally, the court appointed a Monitor and an Oversight Committee,[5] charged with the administration of its remedial decree. The court also conducted periodic reviews of the State's compliance with its orders. Finally,

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[4] This very prestigious committee was composed of Dr. Robert M. Anderson, Jr., Vice Provost for Extension and Director of Cooperative Extension at Iowa State University; Lt. Gen. Julius W. Becton, Jr., former President of Prairie View A & M University and board member for various organizations committed to equal access to higher education and former member of various presidential administrations; Dr. Harold L. Enarson, President Emeritus of The Ohio State University, Executive Director of the Western Interstate Commission for Higher Education and member of President Truman's White House Staff; Dr. Robben Fleming, President Emeritus of the University of Michigan at Ann arbor, former President of the Corporation of Public Broadcasting; Chairman of the American Association of Universities and a Fellow of the American Academy of Arts and Sciences; and Dr. Bryce Jordan, President Emeritus of the Pennsylvania State University and founding president of the University of Texas at Dallas.

[5] The Oversight Committee is composed of four of the five previously appointed neutral expert witnesses.

the district court retained jurisdiction to monitor the State's progress in implementing these changes.

Over the succeeding decade, under the supervision of the court, the parties worked tirelessly to develop and implement new programs, change old ones, and in many other ways to effectuate the changes called for in the court's remedial decree. The district court has noted on numerous occasions, as it did in ruling on the instant motion, that "the State has unbegrudgingly complied with the Court's remedial decrees, meeting all its obligations as ordered by the Court." *Knight v. Alabama,* 458 F.Supp.2d 1273, 1312 (N.D.Ala.2004) ("*Knight III*"). The court and the parties anticipated that, after ten years of constructive remediation of Alabama's system of higher education, the court would return control of that system to Alabama in the summer of 2005. *Knight I,* 900 F.Supp. at 374.

This lawsuit, then, for over fifteen years, has been about remedying *segregation* in Alabama's system of *higher* education by making changes in the education policies that tended to keep Alabama's historically black colleges black, and its historically white colleges white. While the court has ordered many changes that required the State to dramatically increase its funding of higher education – especially at its historically black institutions – the State has always "unbegrudgingly" raised and spent this money. This lawsuit, however, has never been about *how* Alabama raised the money to meet its court-ordered obligations to *higher* education, much less about how Alabama funds its system of *lower* ("K-12") education.

Nonetheless, in July of 2003, plaintiffs filed the pleading we now review. Although styled "Motion for Additional Relief," nowhere in the motion is there any

request for additional relief regarding Alabama's *higher education* system. There is no request whatsoever for additional funding or any other changes in the education policies governing higher education in Alabama.

Instead, plaintiffs request an injunction ordering Alabama to fund adequately its system of *lower* education, and to do so by developing an entirely new method of public school finance in the state. Plaintiffs contend that only the complete reformation of Alabama's school finance system for *lower* education – including the invalidation of certain provisions of the Alabama Constitution[6] that limit both the rates and actual revenues from property taxation – will allow the State to raise the revenue necessary to adequately fund its K-12 schools. And, only when Alabama's public schools are adequately funded, according to plaintiffs, will there be sufficient other funds to achieve the remedial goals of this lawsuit. Therefore, plaintiffs asked the district court to invalidate the property tax limitations of the Alabama Constitution and to enjoin the State to reform its method of public school finance within one year to provide adequate and equitable funding for its K-12 schools.

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[6] Various constitutional provisions limit the rate of property taxation by the state and its counties, impose significant assessment limitations on certain classes of property for taxation purposes, and provide substantial exemptions from taxation. Finally, Amendment 373, passed in 1973, known as the "Lid Bill," limits tax collections in any one year on any particular property to a certain percentage of its fair market value. Plaintiffs assert that they are entitled to a declaration that these property tax provisions violate the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d.

Although moved by defendants not to allow a new theory of liability ten years after the entry of the court's remedial decree, the district court held a two-day evidentiary hearing on the claim in May of 2004.[7] The court heard from many experts on both the historical context and the school funding implications of Alabama's methods of public school finance.

The following October, the district court entered a ninety-page opinion and order denying the "Motion for Additional Relief." *Knight III,* 458 F.Supp.2d at 1314. The district court held that, as a claim for liability, plaintiffs had failed to establish that the alleged funding crisis in Alabama's *K-12* education system had a segregative effect on its system of *higher* education. *Id.* at 1312-13. Furthermore, the court held plaintiffs had failed to establish a need for any additional relief, as the State had already complied, or was complying, with all the court's previously-entered remedial orders, as agreed upon by all the parties. *Id.* The district court concluded that, while it "appreciate[d] Plaintiffs' argument" that "the current property tax system in Alabama has a crippling effect on the ability of local and state government to raise revenue adequately to fund K-12 schools," it disagreed with plaintiffs' assertion that this lower school *funding* problem was sufficiently related to the *desegregation* of the State's higher education system to permit a remedy in this lawsuit. 458 F.Supp.2d at 1312.

We agree with the district court that plaintiffs' present claim is fundamentally about reforming Alabama's K-12

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[7] The State did not appeal the denial of its motion to disallow plaintiffs' new claim.

school funding system, and not about desegregating its colleges and universities. Plaintiffs themselves made this clear when they filed the claim. On the first page of their supporting memorandum, plaintiffs called the district court's attention to Alabama Supreme Court's dismissal of the public school funding litigation in the Montgomery County Circuit Court, known as the *Equity Funding Cases. See Ex Parte James,* 836 So.2d 813, 816 (Ala.2002). Plaintiffs asserted that the dismissal of these state cases entitled them to "raise claims regarding Alabama's school funding system in this [federal] action."[8] Plaintiffs' requested relief was that the district court enter an injunction requiring the State to revise its tax policies and tax rates to *adequately fund K-12 education.*

Plaintiffs present claim, then, is not a claim for *desegregation* in Alabama's system of higher education. It is a school finance claim. Because we find this distinction fatal to plaintiffs' claim, we pause to explain the difference.

II.

Section 256 of the 1901 Alabama Constitution requires "a liberal system of public schools throughout the state for the benefit of the children." In 1956, as the State's direct, indeed avowed, response to *Brown v. Board of Education*, Section 256 was amended to provide that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense." Ala. Const., art. XIV, § 256, Amend. 111

[8] Much of this history is chronicled in the district court opinion. *See Knight III,* 458 F.Supp.2d at 1279-1311.

(1901). Thereby, Alabama served notice that its support for integrated public education was conditional. Subsequently, other amendments were added to the state constitution that imposed strict limits on the ability of state and local governments to raise revenue from property taxes – the traditional method of funding K-12 education in Alabama.[9]

In 1990, the Alabama Coalition for Equity, Inc. (the "Coalition"), acting on behalf of schoolchildren, parents and school systems throughout the State of Alabama, brought a lawsuit in circuit court in Montgomery County, Alabama, seeking a declaration that Amendment 111 was unconstitutional because its avowed purpose was racial discrimination. The Coalition also sought a declaration that state funding of K-12 education did not provide an adequate or equal education for all of Alabama's school children. *Alabama Coalition for Equity, Inc. v. Hunt,* No. CV-90-883 (Ala.Cir.Ct. Apr. 1, 1993). This case was consolidated with a similar lawsuit filed in the same court in 1991, *Harper v. Hunt,* No. CV-91-0117 (Ala.Cir.Ct. Jan. 19, 1991) and together they became known as the *Equity Funding Cases,* reprinted in *Opinion of the Justices No. 338,* 624 So.2d 107, 110-67 (Ala.1993).

In April of 1993, the *Equity Funding Cases* state court held that Amendment 111's racially discriminatory purpose violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 111-12. The court declared that Amendment 111 of Section 256 was void in its entirety. *Id.* The court also declared that the original language of Section 256, guaranteeing Alabama's school children an "adequate education,"

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[9] *See* note 5, *supra.*

remained Alabama law. *Id.* The court further held that, although Alabama's schoolchildren were guaranteed an adequate education, Alabama's funding of its public school system did not provide it. *Id.* The court enjoined state officers to "establish, organize and maintain a system of public schools, that provides equitable and adequate educational opportunities to all school-age children." *Id.* at 166.

This judgment was not appealed, in part because the circuit court retained jurisdiction over the case to address other matters,[10] but the legislature immediately passed a resolution requesting the Alabama Supreme Court to render an advisory opinion on whether the circuit court's judgment was binding in view of the separation of powers principle of the Alabama Constitution.[11] On April 27, 1993, barely four weeks after the circuit court's judgment, the Supreme Court advised the legislature that the state court's order must be enforced. *Id.* at 110.

Over the course of the next decade, remedial plans were proposed but none was implemented. Although there was much ado, it turned out to be about nothing much. Consequently, in 2001, the *Equity Funding Cases* plaintiffs moved the Montgomery County circuit court to take some action to enforce its injunction. Shortly thereafter, the State proposed a new remedial plan containing an estimated

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[10] Additionally, the parties were never really in an adversarial position. *See Ex Parte James,* 836 So.2d at 816 (noting that "members of this Court have expressed serious concerns regarding the underlying foundations of this case," and citing Hooper, C.J., dissenting from the *James* majority, describing the proceedings as a " 'sham' due to a lack of true adversity between the parties").

[11] The Alabama Advisory Opinion Act authorizes the Justices of the Supreme Court to render advisory opinions to the legislature. Ala.Code § 12-2-10.

annual increase in expenditures for K-12 education of $1.7 billion.

One year later, in 2002, the Alabama Supreme Court dismissed the *Equity Funding Cases,* holding that the circuit court's order did, after all, violate the Alabama Constitution's principle of separation of powers. *Ex Parte James,* 836 So.2d at 816. The court held that "because the duty to fund Alabama's public schools is a duty that – for over 125 years – the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought."[12] *Id.*

Within a year of the Alabama Supreme Court's dismissal of the *Equity Funding Cases,* plaintiffs in this case filed their "Motion for Additional Relief."[13] Although styled as a motion for additional *relief*, plaintiffs really sought an adjudication of a new *claim*. For the first time in *this* lawsuit, plaintiffs claimed that segregation in Alabama's system of higher education is caused by Alabama's constitutional

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[12] The court relied upon Section 43 of the Alabama Constitution, which provides that the court "shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." 836 So.2d at 819. The court reasoned that "[t]he pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of [legislative] power," and "such judicial intrusion would represent a jurisprudential divergence with other state courts who . . . have refused to become involved with school-funding matters." *Id.* at 818, 817. The court held that the imposition of a specific remedy for the violation of any constitutional right to education was beyond its judicial capacity. *Id.* at 819.

[13] Plaintiffs seek an injunction requiring the legislature adequately to fund its K-12 schools. This was the exact relief sought, ordered, but never obtained in the *Equity Funding Cases*.

limitations on its ability to raise property taxes for K-12 education.

Although the connection between underfunding of Alabama's public *schools* and segregation in its *universities* is far from intuitive, plaintiffs constructed an elaborate "chain of causation" said to link the two. According to plaintiffs, Alabama's property tax limitations result in underfunded public schools. This, in turn, results in the diversion of state funds intended for higher education to lower education. This diversion of state funds to K-12 education, results in Alabama's inability to adequately fund its system of higher education. This, in turn, results in higher tuition at Alabama's colleges and universities. At the same time, plaintiffs contend, there is less state money for college scholarships. All of this impacts negatively and disproportionately on Alabama's black students, plaintiffs assert, because most cannot attend college without financial assistance.

Plaintiffs argue, therefore, that their new claim against Alabama's property tax policies is properly brought in this lawsuit because those policies produce a "continuing segregative effect" on its colleges and universities, as proscribed by *Fordice*. We disagree.

III.

1. *Alabama's Tax Policies Are Not Policies "Governing Higher Education"*

Plaintiffs allege that Alabama's tax policies seriously limit the ability of both the State and its counties to raise revenue from property taxes and, therefore, fund its K-12 schools. No one disputes that this is so. Plaintiffs also allege that these constitutionally enshrined tax policies

were adopted for segregative purposes and with discriminatory intent. The district court has so held. The trouble is that neither of these contentions advance the plaintiffs' claim – asserted in its motion for additional relief – that these tax policies may be challenged under *Fordice* as policies that perpetuate segregation in Alabama's system of higher education. They may not.

Under *Fordice*, "policies now *governing the State's university system*" may violate the Fourteenth Amendment if they are "traceable to its prior de jure dual system" and "continue to have segregative effects." 505 U.S. at 733, 112 S.Ct. 2727 (emphasis added). The segregative policies proscribed by *Fordice* govern *higher education,* not *revenue raising.* The property tax policies plaintiffs now challenge, however, are revenue policies; they are *not* policies that "govern higher education" as contemplated by *Fordice.* The challenged tax policies have nothing to do with admissions, faculty and administration, availability of degree programs, student recruitment, education facilities or any other aspects of higher education that *Fordice* recognized may discourage black students from attending historically white institutions and white students from attending historically black institutions. They are not, therefore, the sort of *education* policies that *Fordice* recognized could perpetuate racial identifiability in higher education. We conclude, therefore, that plaintiffs' present claim is not properly brought under *Fordice.* The district court knew that there was something wrong with this approach, but employed it anyway. *See* 458 F.Supp.2d at 1313 n. 9 ("The Court expresses doubt that the matter before the Court even triggers *Fordice*"). We decline to do so.

Furthermore, even if Alabama's property tax policies were properly attacked under *Fordice,* we would agree

with the district court that any segregative effect they may have on its system of higher education is far too attenuated to entitle plaintiffs to the relief they request. Plaintiffs' chain of causation contains the following links: constitutional limits on property taxation result in underfunded K-12 schools, which causes the State to divert state funds intended for higher education to lower education, which results in higher tuition at Alabama's colleges and universities as well as fewer funds for student aid and, therefore, lower black attendance. The district court concluded that there are simply far too many links in this chain to permit us to infer that Alabama's method of funding its K-12 education causes, in any meaningful way, the continuing segregation of its colleges and universities. We agree.

Additionally, we note that plaintiffs' chain of causation silently incorporates too many unsupported assumptions. First, plaintiffs assume that the abolition of Alabama's constitutional limitations on property taxation will result in increased tax revenues. Second, plaintiffs assume that legislative decisions regarding the allocation of these putative increased revenues will result in increased funding of higher education. Even a cursory examination reveals that neither of these assumptions is unproblematic.

It is not at all clear that the removal of Alabama's constitutional restrictions on property tax rates will necessarily result in either *increased tax rates or increased tax revenues.* In 2003, for example, proposed changes in Alabama's tax structure, including state and local property taxes, were overwhelmingly rejected by Alabama voters. Even in the absence of constitutional limitations, there is nothing in plaintiffs' request for relief that would inhibit the ability of the people of Alabama to refuse to raise property tax rates.

Similarly, there is no way to know how the elimination of constitutional limitations on property taxes will affect the willingness of industrial or other commercial activity to locate or remain in the state. The possibility of business flight, thereby decreasing tax revenues of all kinds, is not addressed by plaintiffs' chain of causation.

Furthermore, plaintiffs' demand for the removal of the constitutional property tax restrictions assumes not only that tax revenues will necessarily increase, but that these revenues would automatically go to Alabama's under-funded K-12 schools. But such *revenue allocation* decisions are the province of the Alabama state and local governments. Even if Alabama's property tax revenues were to increase, thereby potentially increasing funds for both K-12 and higher education, there is no way to know what the Alabama legislative response would be. Although Alabama presently spends a higher percentage of its total budget on public education than any other state in the union, and ranks higher in per capita spending for education than for overall government spending,[14] there is no way to predict whether these levels of appropriations would continue if Alabama's property tax revenues were to increase.

Many other public programs compete with education for the Alabama tax dollar. Highway construction and maintenance, public safety programs, public health undertakings, and a host of other programs compete for Alabama's tax dollar. Presently, virtually 100% of the state

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[14] We do not overlook the fact that Alabama's total tax revenues rank it 46th among the states or that its per capita state and local government expenditures for K-12 education rank it 39th. These expenditures reflect legislative choices on the allocation of resources that are beyond the reach of this court.

income tax is appropriated to K-12 education (teacher salaries). Most of the state's sales tax revenues also go to general education purposes. If property tax revenues were to rise, it is impossible to say whether the State would continue to allocate the sales and income taxes to education or transfer these revenues to other programs.

Neither is there any way to know whether tuition would decline or student financial assistance would increase. These appropriation decisions would remain totally unaffected by any order of this court affecting Alabama's property tax limitations, assuming, of course, that we do not also assume the "fundamental and delicate power of taxation" in the State of Alabama.[15] *Missouri v. Jenkins,* 495 U.S. 33, 51, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990).

We conclude that even if underfunding of Alabama's K-12 schools were related to segregation in its colleges and universities, this relationship is too attenuated and rests on too many unpredictable premises to entitle plaintiffs to relief under *Fordice.*

At root, the problem with plaintiffs' new claim is that it is not a claim for desegregation, but is rather an attack on Alabama's method of public school funding.[16] Plaintiffs'

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[15] In *Missouri v. Jenkins,* the Supreme Court expressly rejected a district court's attempt to remedy school underfunding through the judicial increase of tax rates. 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). The Court agreed that the district court exceeded its authority in ordering raised the property tax rate of the Kansas City, Missouri School District. *Id.* at 51, 110 S.Ct. 1651.

[16] Alabama argues that it must be remembered that its relatively low property taxes are part of an overall tax structure that relies as well on an income tax and a sales tax. Other states, it reminds us, depend more heavily on property taxes because they have no income tax (Florida and Washington) or no sales tax (Oregon and New Hampshire). Furthermore,

(Continued on following page)

claim is typical of those made in a proliferation of school finance litigation over the last thirty years.[17] Such litigation often attacks the county-based property tax method of funding K-12 education, seeking to increase the amount raised, and to equalize the amount available to each county in order to improve the academic opportunities and performance of students disadvantaged by existing finance schemes. Aimed as it is at increased and equalized funding, it targets not only minority students, but all "poor" students. Thus, school finance litigation is not aimed at *desegregation* under the United States Constitution, but rather at equalization of resources in order to provide an adequate education required not by the federal, but by *state* constitutions.[18]

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even under the Lid Bill, local taxing authorities may raise the rate of any tax through local initiative and public hearing, a local act of the legislature, or local referendum, so long as the constitutional maximums are not exceeded. According to plaintiffs, this method of raising taxes has been utilized extensively since 1978. New amendments to the constitution also permit local constitutional amendments raising property tax rates through local referenda, which allow the Lid Bill property tax limitations to be avoided completely.

[17] *See generally,* James E. Ryan, *School, Race, and Money,* 109 Yale L.J. 249 (1999).

[18] The Supreme Court rebuffed such efforts in the federal courts, holding that there is no federal constitutional right to education and upholding an unequal school finance scheme under rational review. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 58-59, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). After *Rodriguez,* it has been noted that "[w]hether intentionally or not, at least some federal courts have used school desegregation decrees to circumvent the limitations imposed by *Rodriguez* or similar state-court decisions rejecting school finance challenges." Ryan, 109 Yale L.J. at 264. Others have noted that school districts that once intentionally segregated students "have become plaintiffs in school desegregation cases, seeking *Milliken II* relief against the state in an attempt to circumvent the limitations imposed by *Rodriguez.*" Theodore M. Shaw, *Missouri v. Jenkins:* Are We Really a

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The problem for plaintiffs is that this lawsuit *is* about desegregation. Plaintiffs, themselves, filed a claim alleging continued *segregation* in Alabama's colleges and universities. By asserting this claim, they set the agenda of the lawsuit, challenging Alabama's policies that govern higher education. *Fordice,* 505 U.S. at 733, 112 S.Ct. 2727. Alabama's property taxes are not such policies.

Plaintiffs' new claim, if successful, might obtain a remedy for the underfunding of Alabama's public schools already established in the *Equity Funding Cases.* While we, like the district court, are not entirely unsympathetic to plaintiffs' attempt to bring Alabama's K-12 funding problems, identified but never remedied in the *Equity Funding Cases,* within the reach of the mandatory injunction already in place in this case, we agree with the district court that such a remedy is not available in this lawsuit. After fifteen years of litigation aimed at changing Alabama's education policies that perpetuate segregation in its colleges and universities, plaintiffs are attempting to transform their *Fordice* attack on Alabama's segregative education policies into an attack on the adequacy and fairness of Alabama's entire public school finance system. This claim is not properly before us.[19]

Desegregated Society?, 61 Fordham L.Rev. 57, 60 (1992). Similarly, plaintiffs in this desegregation lawsuit are seeking school *finance* reform.

[19] Plaintiffs appear to argue in their brief that the legal basis for their present claim (including, apparently, any requirement for causation) is irrelevant. They assert that it is Alabama's duty to eradicate "all the continuing barriers to black students' equal access to higher education, *regardless of how attenuated may be their causal connections to the property tax system* in the court's view." (emphasis added). In plaintiffs' view, it is enough that "[h]igher education is where

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all the underfunded chickens in Alabama's K-Ph.D. system of public education come home to roost." Plaintiffs urge this court to provide them the remedy denied in the state courts because "[t]here is no statewide K-12 school desegregation case; only in the instant action can the full ramifications of the historical discrimination . . . be confronted and remedied."

This request for a remedy untethered to a constitutional violation, though sincere, misunderstands the nature of the judicial power. The courts are not empowered generally to "make things right." The district court's jurisdiction was invoked by plaintiffs to recognize and remedy the constitutional wrongs alleged to exist in Alabama's system of higher education.

Plaintiffs' property tax claim is aimed at Alabama's school finance policies. Although brought under *Fordice,* this claim has almost nothing to do with higher education policies. Furthermore, plaintiffs' belated attempt to add an argument against the tax policies under *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (raised for the first time on motion for reconsideration of the denial of their present claim) and *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) cases having absolutely nothing whatsoever to do with higher education – reinforce our conclusion that the present claim does not arise under *Fordice.*

To the extent that plaintiffs' attack on Alabama's tax policies is predicated upon allegations of underfunding that denies Alabama's schoolchildren an adequate education, it does not state a federal constitutional claim. *Rodriguez,* 411 U.S. at 58-59, 93 S.Ct. 1278. To the extent that plaintiffs' claim is that Alabama's tax policies evidence a discriminatory intent to deprive Alabama's K-12 children of equal protection of the law, under *Underwood* and *Erickson,* it does not state a claim for desegregation of higher education under *Fordice.*

Such distinctions are not mere legal technicalities. Simply put, it is plaintiffs' position that the district court in this case had not only the authority but the obligation to remedy any and all constitutional violations brought to its attention in this lawsuit (plaintiffs assert that "a federal court does not have the discretion to ignore patent constitutional violations solely because they expand the subject matter of the original complaint"). Plaintiffs believe that the district court should have enjoined enforcement of the offending tax provisions whether or not they affect higher education "in light of the findings of continuing adverse racial impact in *other areas of public education and civil society.*" We are asked to correct the "clear equal protection violations" alleged in Alabama's tax policies notwithstanding the fact that, as

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2. *Even Under Fordice, the Constitutional Property Tax Provisions Do Not Have a Continuing Segregative Effect on Higher Education in Alabama.*

Even if we were to overlook the inapplicability of *Fordice,* and examine plaintiff's claim under that standard, we would agree with the district court that Alabama has met its burden to demonstrate that its property tax policies do not have a continuing segregative effect on its system of higher education. Plaintiffs assert that higher education in Alabama is so underfunded that black students are denied an equal opportunity to attend college. The record evidence is to the contrary.

Under *Knight I,* the State has demonstrated its willingness and ability to raise funds for higher education irrespective of its K-12 funding policies.[20] From 1990 to

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plaintiffs concede, they have "limited their demands for relief to desegregation of higher education." We are empowered, plaintiffs assert, by Rule 54(c) of the Federal Rules of Civil Procedure to "grant the relief to which the party . . . is entitled, even if the party has not demanded such relief in his pleadings."

We must decline such a request to expand our authority beyond this "case or controversy" to the general "doing of justice" that plaintiffs appear to believe to be our statutory mandate. Despite what plaintiffs think, Rule 54(c) does not empower us generally to provide a remedy for all wrongs. Plaintiffs' challenge of Alabama's tax policies at this late date in this higher education litigation raises issues involving the Eleventh Amendment, the Tax Injunction Act, the availability of a state remedy and a host of other issues – none briefed, argued, or considered by the district court. We must resist this attempt and the invitation to abandon long-standing principles of judicial restraint.

[20] To the extent that plaintiffs argue that their funding claim is appropriate in this case because Alabama does not have enough money to effect the desegregation remedies previously ordered, the district court rejected this contention and so do we. Plaintiffs point to no specific instance where the State has failed in its remedial obligations. On the contrary, the district court noted that the State has met all of its

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2004, Alabama's appropriations for higher education increased from $820,063,882 to $1,160,033,885 annually. Over $179 million in new funds had been appropriated to Alabama's historically black universities as of 2003.[21] Alabama has clearly demonstrated an ability to raise funds for its colleges and universities despite its K-12 funding limitations.

Furthermore, as a result of changes in the policies that govern higher education in Alabama – agreed to by the parties and implemented by the State – there has been enormous improvement in black students' access to higher education in Alabama. During this period, total undergraduate or graduate degrees awarded to black students increased 96.43%, while white students' graduation rates actually dropped 13.36%.

Part of the credit for such improvement in black completion rates must be given to the many new financial aid programs benefitting black students that the State has instituted. Numerous minority and diversity scholarships have been added at both of Alabama's historically black universities. The State also created the Alabama State University Trust for Educational Excellence and the Alabama A & M University Trust for Educational Excellence – both of which have, as their first dedicated use, the

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obligations under previous orders and done so "unbegrudgingly." Based upon the record, we agree.

[21] Although unrelated to the ability of black students to attend college, it should be noted that the State has complied with the district court's order to improve the curricula of its historically black colleges, adding programs in mechanical and electrical engineering, masters programs in accounting, health information management programs, occupational therapy programs physical therapy and a doctorate program in educational leadership.

funding of diversity scholarships. *See Knight II,* 900 F.Supp. at 349-56.

The district court has unflaggingly monitored Alabama's progress in completing the desegregation of its system of higher education over the last ten years, and it has pronounced itself satisfied that the State has met its *Fordice* burden (if any) to demonstrate that the challenged tax policies do not produce a segregative effect on Alabama's system of higher education. To be sure, Alabama's colleges and universities remain a work in desegregative process. But, over the last ten years, the State has worked diligently with the plaintiffs to develop and implement modifications in the policies that govern Alabama's system of higher education. These changes have ameliorated the segregative effects of underfunding – from *whatever* source – and underuse – for *whatever* reason – of Alabama's black colleges and universities, and brought meaningful desegregation to the State's system of higher education, as the district court envisioned and ordered. We agree with that court that the challenged tax policies have not undermined that desegregative process to a level that even remotely triggers the United States Constitution.

IV.

We cannot permit federal lawsuits to be transformed into amorphous vehicles for the rectification of all alleged wrongs, no matter how belatedly asserted, nor how unrelated to the underlying action.[22]

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[22] Although our decision today may be seen to leave plaintiffs without a remedy for the wrong identified in the *Equity Funding Cases,* the Supreme Court suggested in *Rodriguez* that:

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As the district court said in its 1995 remedial decree:

> This Court does not intend this Remedial Decree to solve all of Alabama's education woes or racial tensions. Alabama has much of both that are beyond the scope of the court's remedial authority. The court does intend the Decree to eliminate segregative effects remaining within Alabama's system of higher education, as far as practicable and educationally sound.

Because the district court correctly rejected plaintiffs' newly raised claim that Alabama's tax policies have a continuing segregative effect on its system of higher education, we hold that the judgment of the district court is

AFFIRMED.

> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . . . the need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. . . . but the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

411 U.S. at 58-59, 93 S.Ct. 1278.

458 F.Supp.2d 1273

United States District Court, N.D. Alabama.
John F. KNIGHT, Jr., et al.,
Plaintiffs and Plaintiff Intervenors,
United States of America Plaintiff,
v.
The State of ALABAMA, et al., Defendants.
No. CV-83-M-1676

Oct. 5, 2004.

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Mary Kirby, United States District Court Northern District of Georgia, Rome, GA, for Mary Kirby, Miscellaneous.

Michael Vance McCrary, Gardner Middlebrooks Fleming Gibbons & Kittrell, Birmingham, AL, for Joe L. Reed, Intervenor Defendant.

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Solomon S. Seay, Jr., Solomon S. Seay Jr. PC, Montgomery, AL, for Alabama, State of, Alabama State University Board of Trustees, Defendants.

Kenneth L Thomas, Thomas Means Gillis & Seay, PC, Montgomery, for Alabama State University Board of Trustees, Defendant.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

MURPHY, District Judge.

This is a desegregation lawsuit involving all public universities in the State of Alabama and a plaintiff class consisting of all black citizens of the State of Alabama. The case is before the Court on Plaintiffs' Motion for Additional Relief with Respect to State Funding of Public Higher Education.

I. Background

A. Summary of the *Knight* Litigation

1. On January 15, 1981, John F. Knight, Jr. and a class of other alumni, students, and faculty members of

Alabama State University ("ASU") filed this lawsuit in the Middle District of Alabama, attacking vestiges of discrimination in the State of Alabama's public higher education system. *Knight v. Alabama,* 787 F.Supp. 1030, 1048 (N.D.Ala.1991) ("*Knight I*"). The Court subsequently held two bench trials, the first in 1991, which lasted six months, and the second in 1995, which lasted six weeks. In both of those bench trials, the Court found that the vestiges of segregation remained within the Alabama system of public higher education, and that those vestiges violated Title VI of the Civil Rights Act of 1964 as well as the Federal Constitution. *Knight I,* 787 F.Supp. at 1368; *Knight v. Alabama,* 900 F.Supp. 272, 280-81 (N.D.Ala.1995) ("*Alabama II*").

2. As a result of the Court's findings in those bench trials, the Court has fashioned and approved a number of remedies, too voluminous to recount here. Those remedies are calculated to eliminate the vestiges of historical discrimination within the Alabama system of public higher education. The Court has also retained active jurisdiction over the case to the present time. Pursuant to this jurisdiction, the Court has appointed a Monitor and an Oversight Committee to oversee on a daily basis the administration of the Court-ordered remedies in this litigation. The Court also conducts periodic reviews of the effectiveness of the Court-ordered remedies.

B. Plaintiffs' Claims

3. Plaintiffs contend that serious underfunding of the Educational Trust Fund ("ETF"), from which appropriations are made for both K-12 and higher education, has jeopardized the success of the remedies crafted by the

Court to eliminate the vestiges of historical discrimination in the State of Alabama's system of public higher education.

4. Plaintiffs claim that adequate state funding is necessary for fashioning an effective, educationally sound, and practicable remedy for the State of Alabama's history of *de jure* racial discrimination. Specifically, Plaintiffs claim that adequate funding is necessary for: (1) recruiting and retaining of black faculty members and high-ranking administrators at historically white institutions ("HWI"); (2) providing ASU and Alabama A & M University ("AAMU") with the necessary resources to overcome a century of underfunding by the State; (3) providing AMU and AAMU the ability to fund adequately scholarships to attract other-race students after the Court-ordered scholarships expire; and (4) developing new, high-quality programs at ASU and AAMU, including the capital facilities and faculty necessary to operate them.

5. According to Plaintiffs, severe cuts in state funding have severely impeded the ability of ASU and AAMU to implement successfully remedial programs calculated to spur growth in academic, research, and public service functions. Plaintiffs specifically point to Alabama's property tax system, which Plaintiffs claim is unfair, inadequate, and unconstitutional. Plaintiffs argue that because of low and inadequate property taxes, which are intended to be the primary source of K-12 funding, the State of Alabama has been forced to allocate an increasingly greater percentage of funds from the ETF to K-12 appropriations. As a result, over the past several years, all of the public state universities have been forced to increase tuition dramatically. Plaintiffs submit that the State's tax burden disproportionately falls on the low-income portion

of the population, which remains predominately black, and consequently acts as a barrier against blacks obtaining public higher education.

6. Plaintiffs claim that the State's tax system is traceable to a prior *de jure* segregation regime. Specifically, Plaintiffs contend that the restrictions on the amount of taxes that can be levied on real property are directly traceable to a policy of shielding the real property of white landowners from taxes that would benefit the education of blacks – a policy that Plaintiffs claim persists to this day. Plaintiffs identify six provisions of the Alabama Constitution that they claim are traceable to a legislative intent to preserve racial segregation throughout the State's system of public education and thwart and deny blacks an equal opportunity to obtain the benefits of public higher education in Alabama.

7. Those provisions are:

(1) Ala. Const. § 214, as amended, which limits the rate of ad valorem taxation the Alabama Legislature may place on taxable property;

(2) Ala Const. § 215, as amended, which limits the rate of ad valorem taxation counties may place on taxable property;

(3) Ala. Const. § 216, as amended, which limits the rate of ad valorem taxation municipalities may place on taxable property;

(4) Ala. Const. § 269, as amended, which limits the rate of ad valorem taxation counties may place on taxable property for the benefit of public education, and which further requires approval of those property taxes by the voters in a referendum election;

(5) Ala. Const. Amendment 325, as amended, which establishes separate classes of property for purposes of ad valorem taxation, lowers assessment ratios, requires voter approval of all property tax increases, and establishes a cap or "lid" on total ad valorem taxes; and

(6) Ala. Const. Amendment 373, which amends the property classes subject to taxation, lowers further the assessment ratios, establishes the current use method of property assessment, and establishes lower "lids" on total ad valorem taxes.

8. Plaintiffs contend that those six constitutional provisions, as well as laws enacted pursuant to those provisions, effectively segregate the races and deny equal opportunity to African-Americans. Plaintiffs therefore request that the Court:

(1) enter a declaratory judgment that the those six constitutional provisions violates the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, the Civil Rights Act of 1866, 42 U.S.C.A. §§ 1981 and 1982, and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d *et seq.*;

(2) enjoin officials of the State of Alabama, pursuant to the Civil Rights Act of 1971, 42 U.S.C.A. § 1983, from enforcing the allegedly unconstitutional policies and practices relating to the funding of public education and from failing to reform those policies and practices in an educationally sound and practicable manner so as to remedy the racial discrimination those policies and practices allegedly perpetuate;

(3) order the State of Alabama to reform the State's tax system within one year in such a manner that both eliminates the vestiges of *de jure* racial discrimination in public school funding and provides adequate funding for public higher education, without denying adequate and equitable funding to K-12 schools;

(4) enjoin the State, if it fails to enact remedial obligations within the time permitted, from reducing current state and local ad valorem millage rates and from enforcing Amendments 325 and 373 to the Alabama Constitution and order the State to apply state and local millage rates uniformly to all taxable property assessed at no less than sixty percent of its fair market value; and

(5) grant Plaintiffs an award of attorneys' fees and expenses.

C. Procedural History

9. On July 28, 2003, Plaintiffs filed their Motion for Additional Relief with Respect to State Funding of Public Higher Education. On October 29, 2003, Plaintiffs filed a Motion for Partial Summary Judgment Regarding Their Motion for Additional Relief with Respect to State Funding of Public Higher Education. On January 8, 2004, the Court held a hearing with respect to Plaintiffs' Motion for Summary Judgment, and on January 28, 2004, the Court entered an Order granting an evidentiary hearing with respect to Plaintiffs' Motion for Additional Relief with Respect to State Funding of Public Higher Education. The Court subsequently denied without prejudice Plaintiffs' Motion for Partial Summary Judgment.

10. From May 4 to 5, 2004, the Court held an evidentiary hearing with respect to Plaintiffs' Motion for Additional Relief with Respect to State Funding of Public Higher Education. The Court now resolves that Motion.

II. Findings of Fact

A. Property Tax Policies Traceable to *De jure* Segregation

1. The 1819 Constitution

11. On March 2, 1819, Alabama was admitted to statehood. (Pls.' Request for Admissions ¶ 17.) The act of Congress admitting Alabama to statehood continued the practice of reserving the sixteenth section of every township as a permanent endowment for public schools and reserving one of two full townships as an endowment for a state university. (*Id.*) The statewide total of sixteenth section public school lands was approximately one million acres. (*Id.* ¶ 18.) The inhabitants of the townships, rather than the State government of Alabama, owned those public school lands; therefore, the 1819 Constitution could only require that the Alabama Legislature preserve the lands from unnecessary waste or damages and apply funding, which could be raised from such lands, in accordance with the purpose of such grants. (*Id.* ¶ 19.)

12. Taxation and appropriations for public education under the 1819 Constitution were statutorily governed – the constitution simply "encouraged" education and gave the General Assembly plenary power to raise funds for schools, as well as the state university. 1819 Ala. Const. Art. on Education. The Alabama Legislature established local mechanisms for leasing the sixteenth section lands for public schools: school commissioners were authorized

to be appointed by the county court to manage the sixteenth section lands and to appoint trustees for each school district. (Pls.' Request for Admissions ¶ 20.) Rents from the leases of the sixteenth section lands were initially disappointingly low, and pressure began to build to sell those lands. (*Id.* ¶ 21.)

13. In 1823, the Alabama Legislature established a state bank because private banks were unable to satisfy the demands of borrowers, who sought capital funds to buy, among other things, slaves and land. (Pls.' Request for Admissions ¶¶ 22-23.) To provide lending capital for the state bank, the Alabama Legislature successfully petitioned Congress in 1827 to authorize the State to sell the sixteenth section lands with the consent of the inhabitants of the townships that owned the lands. (*Id.* ¶¶ 24-25.) Congress also specified that the proceeds of such sales must be devoted exclusively to the use of public schools. (*Id.* at ¶ 25.)

14. In 1828, the Legislature established procedures for selling the sixteenth section lands. (Pls.' Request for Admissions ¶ 26.) Among the purchasers were speculators, many of whom were authorized by law to pay for their land purchases over time. (*Id.*) The proceeds of the land sales were required to be deposited into the state bank, where they became an additional source of capital for borrowers. (*Id.* ¶ 27.) On January 15, 1828, by act of the Legislature, the State assumed fiduciary responsibility of the proceeds of the sales of sixteenth section lands, and became obligated to pay interest directly to the townships and school districts. (*Id.* ¶ 28.)

15. School land purchasers eventually found that their investments outstripped profits, and consequently

failed to make payments. (Pls.' Request for Admissions ¶ 29.) In 1843, the state bank failed, and $1.3 million derived form [sic] the sales of sixteenth section lands and over $300,000 from the sale of the university lands were lost. (*Id.* ¶¶ 30-31.) In 1848, the Legislature committed the State to pay interest at six percent of the indebtedness in perpetuity. (*Id.* ¶ 32.)

16. Most of the antebellum public schools were concentrated in the Black Belt, a fertile region of the State, so named for the dark color of the soil. (May 4, 2004, Tr. at 103-04.) The high concentration of schools in that region was a result of both the relative high value of the land in that region and the Whiggish residents of the Black Belt counties who tended to value formal education more than the Jacksonian Democrats residing elsewhere in the State. (Dep. of Dr. J. Mills Thornton at 26-29.)

17. On February 14, 1854, the Legislature established a statewide public school system, authorizing each county to levy a one mill school tax on real and personal property without the requirement of voter approval by referendum. (Pls.' Request for Admissions ¶ 20.) Revenue generated from the school tax was paid directly into the county treasury. (*Id.*) The 1854 school statute required local jurisdictions to submit the proceeds from the sixteenth section land grants to the State, which would redistribute the funds based on the number of students in each school system. (Thornton Dep. at 23-25.)

18. Before the Civil War, the slave tax and ad valorem taxes land were the principal source of revenue for county governments. (Thornton Dep. at 11-14.) For most of the antebellum period, however, "essentially none" of the revenues from the slave tax and ad valorem taxes

went to public schools. (*Id.* at 21.) Funding for public schools instead depended on the revenues obtained from the lease of sale of the sixteenth section land grants. (*Id.* at 22-23.) Beginning in 1847, the Black Belt counties succeeded in changing the statutory law to shift more of the tax burden from slaves to an ad valorem tax on land, which benefited taxpayers in the Black Belt counties because those taxpayers generally owned more slaves than other residents in the Hill and Wiregrass counties. (*Id.* at 19-21, 26-29.) During the five years proceeding [sic] the Civil War, the amount of ad valorem land tax collected by the State surpassed revenue generated from the slave tax. (*Id.* 20-21.) By 1861, the 1854 public school fund was producing an annual revenue of about $250,000. (*Id.* at 33.)

2. The 1861 and 1865 Constitutions

19. The 1861 Secessionist Constitution and the 1865 Presidential Reconstruction Constitution retained the provisions of the 1819 Constitution with respect to education. (Thornton Dep. at 32-33.) Those Constitutions, like the 1819 Constitution, did not restrict the Legislature's plenary authority to regulate the funding and operation of public education. (*Id.* at 33-34.)

3. The 1867-68 Constitution

20. In 1867 a new state constitution, also known as the Radical Reconstruction Constitution, was drafted, and in 1868 it was ratified (the "1868 Constitution"). (Thornton Dep. at 34.) The 1868 Constitution established a centralized public school system, including the University of Alabama, under the control of a state board of education. (*Id.* at 34-36.)

21. The 1868 Constitution also authorized the Legislature to levy a state poll tax[1] of $1.50 for the use of public schools, and centralized all the sixteenth section lands under the control of the State Board of Education. (Thornton Dep. at 38-39.) Local school districts also received the power to levy a poll tax to be used for local education. (Pls.' Request for Admissions ¶ 41; Thornton Dep. at 37-38.) Additionally, all federal lands granted for education purposes, as well as a tax levied on industrial and commercial corporations, were earmarked for education. (Pls.' Request for Admissions ¶ 41.) The 1868 Constitution also placed a duty on the Legislature to limit the taxing authority of local governments; however, no constitutional limit was specified. (*Id.* ¶ 42 (quoting 1868 Ala. Const. Art. XIII § 16).)

22. Although the schools in Alabama were segregated while the 1868 Constitution was in effect, the State Board of Education exercised special legislative powers to mandate that state public school funds be distributed on a per capita basis, without regard to race. (Thornton Dep. at 37-38.)

23. In addition to the poll tax and the proceeds of the sixteenth section lands, the 1868 Constitution required that all property, not just land, be assessed on a uniform ad valorem basis. (Thornton Dep. at 40.) Further, "because

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[1] A "poll tax" at this time was not a tax levied at the voting place; rather, it was simply a head tax levied on all residents. (Thornton Dep. at 54.) "And that . . . would create some local support for the schools because that poll tax revenue in . . . each district in each township would go directly to the township. And the poll tax that was collected from whites would go to the white school and the poll tax that was collected from blacks would go to black schools." (*Id.* at 38-39.)

the tax assessors [were] radical Republican officials and they [had] no particular interest in protecting well-to-do white property holders, virtually none of whom were Republicans, there . . . was quite an aggressive effort to make sure that . . . these values were accurate." (*Id.* at 42.) Consequently, the ad valorem general property tax generated substantial revenue, doubling the State revenues for public education from amounts received prior to the Civil War. (*Id.*) The University of Alabama, which was barely functioning with a few students on $36,000 income from the lost land grant did not receive any of those public school funds, however. (*Id.* at 42-48.)

24. During the Radical Reconstruction, white small farmers found themselves paying substantially higher taxes on their property, yet receiving fewer public benefits because the State was distributing those funds equally among white and black schools. (Thornton Dep. at 53-55.) Whites resented having to pay for the education of blacks, who paid relatively few taxes, and that resentment fueled accusations of mismanagement and abuse of public funds – *i.e.* that their increased taxes were simply lining the pockets of white carpetbaggers and radical officials. (*Id.* at 50-52.) As a result, poorer white landowners became motivated to cooperate with wealthier whites to form a "sort of all white alliance of the Democratic party," united for reducing taxes and establishing supremacy for whites. (*Id.* at 55-56.) On the other side of the political line were the Republicans, who were essentially blacks and a handful of their white allies, carpetbaggers, and scalawags. (*Id.* at 55-56.)

25. Following the failure of railroads whose bonds had been guaranteed by the State and the Panic of 1873, funding for public education became increasingly strained.

(Thornton Dep. at 59-60.) As discussed in the next section, funding for public education fell even more following the ratification of a new constitution in 1875. (Pls.' Request for Admissions ¶ 53.)

4. The 1875 Constitution

26. Because the 1868 Constitution provided for legislative apportionment on the basis of total population, and because blacks were counted for the first time, legislative power shifted from the white counties to the Black Belt counties. (Thornton Dep. at 56-57.) Although blacks constituted a large portion of the population in the Black Belt counties, after Redemption, blacks were controlled by intimidation and fraud, so as to permit a small number of whites in the Back Belt counties to exercise disproportionate power in the Legislature. (*Id.*)

27. In 1875, whites from the Black Belt, concerned that a black majority might regain political power and raise taxes, placed in the constitution millage caps for both state and local property taxes. (Thornton Dep. at 60-69; Pls.' Request for Admissions ¶ 51.) The 1875 Constitution thus became the first Alabama constitution to place strict constitutional limits on the ability of both the State and local governments to tax property. (Thornton Dep. at 60-69; Pls.' Request for Admissions ¶ 51.)

28. Specifically, the 1875 Constitution established a maximum tax rate of seven and one half mills, which was the same legislatively established rate that had been assessed under the 1868 Constitution, and a maximum tax rate of five mills for counties and municipalities. (Thornton Dep. at 65-66.) Racial motives permeated the establishment of constitutional caps on millage rates:

> [D]uring Reconstruction, the experience of [Black Belt] whites had been a county government which was controlled by blacks and their Republican allies and which had very heavily taxed them, and taxed them for purposes that they largely regarded as illegitimate, such as the education of the Freedmen. Now that they had power back into their own hands, they were intent on . . . using that new control to protect themselves from the possibility that the black majority in their counties would ever again be able to use that political power . . . to tax them in a way that would force them as the property holders to cough up the funds, . . . which would be used to the benefit of the majority of the people in the Black Belt who were black and essentially nonproperty holding. . . . And so they wanted to write into the Constitution permanent protections.

(Thornton Dep. at 67-68.)

29. Whites living in the Black Belt counties also used their influence over local tax assessors to reduce property assessments in the Black Belt far below market value, which disadvantaged other white counties. (Thornton Dep. at 60-69.) Additionally, the legislative sessions that followed ratification of the 1875 Constitution further lowered the millage rate from 7.0 mills in 1877 to 4.0 mills in 1890 so as to shield property from taxation. (Pls.' Request for Admissions ¶ 54.)

30. From 1875 to 1891, black schools received a proportionate amount of school funding. (Thornton Dep. at 78.) In 1891, however, the Apportionment Act was enacted, thereby giving discretionary authority to local school trustees to apportion funds among schools. (*Id.* at 80-81.)

As a result, funding destined for black schools was diverted to white schools all over the State. (*Id.* at 81.) "But of course in the majority Black Belt townships, . . . this ha[d] an enormous and devastating effect on black education." (*Id.*)

31. The 1891 Apportionment Act also had an impact on the politics of property taxes. (Thornton Dep. at 81, 83.) By diverting funds from black schools to white schools, there was less of a need for additional property taxes in Black Belt counties because white schools were being funded adequately. (*Id.* at 82.) Consequently, the Black Belt whites, due to total population apportionment, were able to thwart attempts by reformers in urban areas and in white counties to raise taxes to increase funding for public schools. (*Id.*)

e. The 1901 Constitution

32. Disfranchising blacks and maintaining white supremacy were the central purposes of the 1901 Constitution. (Thornton Dep. at 97, 119.) Indeed, the public school funding provisions of the 1901 Constitution are directly traceable to the 1875 Constitution, and propertied interests in the State were successful once again in protecting their financial interests. (Pls.' Request for Admissions ¶ 67.)

33. Black Belt whites were willing to support legal disfranchisement of blacks in the 1901 Constitution, and thus relinquish their control over state politics through control of the large black voting populations, out of fear that events at the national level would eventually lead to the re-enfranchisement of blacks, thus placing whites' property in danger of being taxed to support education for

blacks. (Thornton Dep. at 100-06.) The ensuing compromise between the whites in the 1901 constitutional convention was that the white counties would effectively control the executive offices of the State, while the Black Belt counties would control the Legislature. (*Id.* at 105.) This arrangement assured that the Black Belt could thwart attempts to increase property taxes. (*Id.*)

34. Considerable support existed for dividing funds for public education according to the taxes paid by each race. (Pls.' Request for Admissions ¶ 65.) Racial feelings, based on social and economic rivalry with blacks, had always run high among the poorer whites. (*Id.*)

35. White delegates from black counties, however, defeated the racial apportionment of taxes because it was against those whites' interests in securing a greater share of school revenues, which the whites were already allocating disproportionately to their white schools. (Pls.' Request for Admissions ¶ 64.)

36. The urban industrialists and Black Belt planters who controlled the 1901 constitutional convention preserved the 7.5 total millage cap that existed under the 1875 Constitution: the cap on state property taxes was reduced to 6.5 mills, but counties were authorized to levy up to 1.0 mills for schools. (Thornton Dep. at 108-11.) The 1.0 mill optional county tax for schools contained for the first time in Alabama history a voter referendum requirement, which was crafted to ensure, with disfranchisement, that only whites could give their consent to higher local property taxes. (*Id.* at 106-07, 115-16; Pls.' Request for Admissions ¶ 66.) This general hostility to home rule in the 1901 Constitution, as well as the 1875 Constitution, was motivated at least in part by race: "white control of

the state government . . . is an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties. And so it's important not to have too much power in the hands of the counties, or to make sure that the power . . . that is at the local level is in safe, that is, Democratic and white hands." (Thornton Dep. at 92.) White supremacy was unquestionably the dominant view of education for all the members of the 1901 constitutional convention:

> [T]here is a wide variety of opinions about . . . the interaction of education and race. There are delegates who believe that blacks should receive essentially only vocational education. And there, on the other hand, are delegates who believe that over a long period of time through the educational mechanism, it might be possible to improve the status of blacks. There is nobody at the convention who is not a white supremacist, but there are varieties of opinions about . . . whether white supremacy is an immediate necessity or whether white supremacy will always exist because of inherent differences between the races. And everything in between. That's a whole spectrum of opinions. I doubt, however, that there was anyone in the white counties who needed to be convinced, at least of the immediate necessity, of white supremacy. There is nobody at the convention who's not a white supremacist.

(*Id.* at 111-12.)

37. Once blacks were disfranchised by the 1901 Constitution, whites became more willing to support public education. (Thornton Dep. at 123.) In the Black Belt counties, support existed for a new teacher certification law, uniform textbooks, and redistricting. (Pls.' Request for

Admissions ¶ 73.) The local tax privilege, however, was not popular in the Black Belt counties – by 1914, of the forty-six counties in Alabama that had levied a local school tax, only one (Marengo) was in the Black Belt. (*Id.*)

38. During the Progressive Period preceding World War I, the Legislature made three attempts to increase funding for education. First, a state board of equalization was created to police county tax assessors in an effort to remedy unreasonably low tax assessments. (Thornton Dep. at 125-26.) Second, in 1911, the Legislature passed a statute, which in 1935, was later slightly amended, establishing a sixty percent assessment ratio for all property. (*Id.* 126-27.) Third, in 1915, after school revenues again fell beneath expectations, Amendment 3 was ratified, which authorized counties to levy an additional one mill for schools and lowered the referendum margin from three fifths to a simple majority of those voting. (*Id.* at 129-30.)

39. In 1933, an [sic] constitutional amendment was ratified authorizing an income tax. (Thornton Dep. at 137-38.) The amendment provided that the proceeds of the income tax would first fund the State's floating debt, then would be allocated to a long term reduction of the State property tax. (*Id.* at 138.) That amendment did not restrict the authority of local governments to levy property taxes. (*Id.*)

40. In 1927, inasmuch as the constitutional caps on state and local taxation of personal property required other forms of taxation to raise revenue, the Legislature by statute segregated public school funds from general funds in the State budget, creating what was then called the Special Education Trust Fund. (Thornton Dep. at 142-43.) In 1935, the Legislature also statutorily enacted the State's first sales tax and created the Minimum Program

Fund for schools. (*Id.*) The establishment of the Special Educational Trust Fund and the Minimum Program Fund represented substantial advances in the funding of public schools in the State. (*Id.* at 143.) Prior to the establishment of the income tax, sales tax, Special Educational Trust Fund, and the Minimum Program Fund, state universities had received appropriations from other state revenues – *i.e.* the State property tax. (*Id.* at 143-44.)

41. In 1947, the state income tax was earmarked for K-12 teacher salaries by Amendment 61 to the Constitution of 1901. (May 4, 2004, Tr. at 155.)

f. Amendments 325 and 373

42. The impact of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), on white Alabamians' support for public education varied according to how seriously they took the threat of federally mandated school desegregation:

> For many years after *Brown* the feeling was quite widespread in the South that there simply was going to be no way that the federal government would ever have the power to bring integration to the state. There was no sense . . . that integration was impending or even very likely. And if you are quite confident that that's true, then you can continue to be an advocate of increased funding for the schools and the confidence that these schools . . . will continue segregated.
>
> If, on the other hand, you believe that there is some real likelihood that schools will be integrated, then you would have very much more substantial doubts because all political leaders at

> this period said, and some actually believed, that the outcome of the integration of the schools would be the abolition of the schools. Certainly Governor John Patterson was, not merely in rhetoric but actually in his heart, . . . to the abolition of the public school system of the state if integration came to the state, or particular school districts, . . . if there was no likelihood that it was going to become statewide, he was prepared to close them in particular districts and leave them open elsewhere.
>
> And Governor Wallace, I think actually welcomed the thought of general conversion to a system . . . of private segregated academies if there continued to be some form of public funding that did not go to the school, but instead went to the parents in the form of tuition grants or scholarships, . . . which the parents could then use to send their child to the segregated private academy.

(Thornton Dep. at 163-64.)

43. An attempt was made to raise the constitutional limit on local property taxes in 1955, but it was defeated. (Pls.' Request for Admissions ¶ 80.) The rate of ad valorem taxation which was constitutionally fixed at a maximum of 7.0 mills had not been changed since Amendment 3 was approved in 1916. (*Id.* ¶ 81.) Permissive legislation and the required constitutional amendments had granted thirteen county and twenty-three city school districts the right to raise their school ad valorem taxes, with the highest rates being 17.5 mills. (*Id.*) The local school tax amendment would have allowed the addition of another 5.5 mills to the allowable seven mills to produce a total of 12.5 mills for school purposes when local citizens so desired. (*Id.*) But the voters rejected those tax increases

over which they had control; these included taxes to benefit education. (*Id.*) The same 1955 legislature increased the tax rate 16.67 percent on gasoline to raise $50 million for highways and levied for welfare a tobacco tax to raise $2.4 million and increased taxes on alcoholic beverages and corporations. (*Id.*) The people of the State had no chance to vote against those issues, but they did exercise their prerogative to disapprove taxes when the school tax amendments were placed before them. (*Id.*) The constitutional amendments affecting education were all soundly defeated at the polls on December 6, 1955. (*Id.*) This defeat threw education in Alabama into the worst proration of funding since the depression. (*Id.*)

44. On December 20, 1955, the voters approved Amendment 111, which this Court found to have "adopted most of the recommendations of the 1954 Interim Legislative Committee report for the racially discriminatory purpose of preserving segregation in the public elementary and secondary schools of the state." (Pls.' Request for Admissions ¶ 82 (citing *Alabama I,* 787 F.Supp. at 1104).) The legislature and citizens denied additional taxes for the support of public education, a condition which lasted until 1963 and from which it took education many years to recover. (Pls.' Request for Admissions ¶ 83.) This provision remains unchanged today, and the support of public education is constitutionally permitted but not required in Alabama. (*Id.*)

45. As the threat of school desegregation intensified, legislative enthusiasm for funding public schools sharply diminished. (Pls.' Request for Admissions ¶ 84.) Particularly in the Black Belt, whites

> were committed to the idea that public education could not continue if in fact it was ordered to occur on an integrated basis. The schools would simply have to be closed; public education would have to end because an integrated education was not acceptable. [W]ith that as a fundamental first priority, any efforts to raise property tax, increase any kind of funding of schools, was in serious trouble and of great question until the matter of school integration was settled. And so when there were funding crises in education in the 1950's, . . . it was very difficult to get support for that even when it was advocated by the staunchest of segregationists like Governor John Patterson, who understood that the white schools needed money, the universities needed money, but he also had to announce . . . this is with . . . the understanding that any new funding occurs only with the understanding that schools stay separate.

(May 4, 2004, Tr. at 97.)

46. The 1959 Legislature authorized the creation of independent school districts throughout the state. Acts 1959, 2nd Ex.Sess., No. 126, p. 198. (Pls.' Request for Admissions ¶ 85.)

47. In 1962, at Governor Patterson's request, the Legislature passed a constitutional amendment authorizing county commissions to increase property taxes by 5 mills, subject to approval by a majority of the voters. (Pls.' Request for Admissions ¶ 86.) This amendment was approved by the voters on May 1, 1962, and proclaimed ratified as Amendment 202 on May 10, 1962. (*Id.*) Only three cities and eight counties actually passed additional

ad valorem taxes in 1962. (*Id.* ¶ 78.) Many more proposals were turned down. (*Id.*)

48. Meanwhile, throughout the 1950s and 1960s, it was becoming more and more certain that the courts would order reform of the crazy quilt system of property assessments around the state. (Thornton Dep. at 167.) Public utilities, because their property was assessed at the state level, were having state and local millage rates applied to their property's fair market value based on substantially higher assessment ratios (although not the full sixty percent state law called for) than were being applied to others by county tax assessors. (*Id.* at 169.) "The highest assessment level in the state was 30 percent. And that was in Jefferson County. Everything else . . . was below 30 percent. And it was . . . in some counties vastly, grossly below 30 percent." (*Id.*) The Alabama Supreme Court ruled in favor of the utilities when they challenged their assessments in court. *State v. Ala. Power Co.*, 254 Ala. 327, 48 So.2d 445 (1950).

49. Until adoption of the first Lid Bill amendment in 1971, the Alabama Constitution required all taxable property within the State to be included in a single class for ad valorem tax purposes. (Pls.' Request for Admissions ¶ 90.)

50. In 1957, the Alabama Education Commission rejected proposals to reform the property tax system and instead recommended a sales tax increase. This tax had long been supported by the Black Belt planters and urban industrialists as a way to ensure that non-property owners of Alabama paid their "fair share" of the tax burden. (Pls.' Request for Admissions ¶ 92.) In July 1959, Superintendent of Schools Austin Meadows issued a statement that

warned: "The enemies of public schools and those who did not want to pay the school bills timed sharp and deep threats at public schools with the fear of integration to choke education in this state." (*Id.* ¶ 93.) Their attacks, according to Meadows, were not direct: "They oppose the means for providing education." *Id.*

51. The most powerful lobbying organizations in Alabama were the Alabama Chamber of Commerce, the Associated Industries of Alabama and the Alabama Farm Bureau Federation. (Pls.' Request for Admissions ¶ 94.) In 1959, exercising his statutory authority as Revenue Commissioner, Harry Haden issued a revenue regulation that required all property to be assessed at thirty percent of its fair market value. (*Id.* ¶ 95.) Legislators introduced bills that would strip the Revenue Commissioner of his powers. (*Id.*) In the end, Governor Patterson compromised by agreeing to give up Haden's equalization program in return for abandonment of the bills stripping the Revenue Commissioner of his authority. (*Id.* ¶ 96.)

52. The reapportionment controversies of 1962 broke down along urban-rural lines. *See generally Sims v. Frink,* 208 F.Supp. 431 (M.D.Ala.1962) (3-judge court), aff'd *sub nom. Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Nevertheless, the Black Belt agricultural interests and Birmingham industry still shared opposition to increased taxes. (Pls.' Request for Admissions ¶ 97.) Whites were concerned about losing control of their local governments, first, because blacks were gaining the balance of power in local elections by the mid-1950s in Montgomery and Tuskegee, and because blacks were gaining voting majorities by 1966 in Macon, Greene, and potentially a dozen more counties. (*Id.* ¶ 98.) For Black Belt landowners the connection between legislative reapportionment, the rise

of the black vote, and fear of increased property taxes was particularly strong. (*Id.* ¶ 99.)

53. An example of this fear is Sam Engelhardt. Sam Englehardt [sic] was a state senator from Shorter, Macon County, Alabama, during the 1950s. (May 4, 2004, Tr. at 88-90.) During his political career, which extended into the 1960s, Senator Englehardt [sic] was also head of the White Citizens Council of Alabama, Chairman of the Alabama Democratic Party, State Highway Director, the legislator who proposed splitting Macon County, and the legislator who procured the famous Tuskegee gerrymander that was struck down in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). (*Id.*) *See generally Dillard v. Crenshaw County,* 640 F.Supp. 1347, 1357 (M.D.Ala.1986) (discussing Engelhardt's role in Alabama's efforts to suppress black voting strength). Behind Senator Engelhardt's concern about black voting lay economic self-interest. Pls.' Request for Admissions ¶ 100. "Everybody has an angle when they get in [politics]," he said. "I was worried . . . about the tax assessor . . . because of all our holdings," he said, referring to the many thousands of acres of rich agricultural land the Engelhardt family owned in Shorter. (*Id.*) "That was my angle – to protect ourselves. Not only me, but my family. My aunts, uncles, and cousins owned land." (*Id.*) He based his concern about who was tax assessor on a racist assumption. (*Id.*) "If you have a nigger tax assessor," he rhetorically asked a journalist in 1956, "what would he do to you?" (*Id.*) The obvious answer, to Engelhardt, was that a black tax assessor would try to exploit white landowners. (*Id.*)

54. Engelhardt's attitudes about the threat to whites' property taxes posed by rising black political influence was

typical of whites' attitudes throughout Alabama, particularly in the Black Belt. May 4, 2004, Tr. at 90.

> Mr. Engelhardt I think was fully representative of the attitude of the folks who had long been in power, who had dominated the Black Belt counties, who had dominated the legislature in Alabama since Reconstruction, and for that matter who had their way about all the crucial issues in politics in Alabama since Reconstruction. . . .
>
> From their historical experience in Alabama, the most basic and first public policy effort that blacks had made during Reconstruction once they got the franchise initially was to enact property taxes that were much higher on land than had ever existed in Alabama up to that time. So, there's that historical experience that informed for subsequent generations of Alabamians that . . . what a black voter, an empowered black citizen, would want to do, . . . was to put taxes on white landowners.

(Norrell, May 4, 2004, Tr. at 91.)

55. During his first term as governor, George Wallace, who grew up in Barbour County, made no attempt to achieve property tax reform. (Pls.' Request for Admissions ¶ 102.) Throughout the 1960s and 70s, his hallmark opposition to school desegregation, his rural county constituent base, and the growth of private school options for white flight all contributed to the defeat of property tax reform. (*Id.*) In January 1964, Governor Wallace toured the newly opened Macon Academy. (*Id.* ¶ 103.) He praised the private school and a month later called for public contributions to support white students boycotting Macon County's integrated schools. (*Id.*) Wallace's office maintained a file of letters from individuals giving money to the

Macon Academy; one contribution was for twenty thousand dollars. (*Id.* ¶ 104.) A woman wrote to Wallace telling him that she would like to donate seven thousand dollars toward the improvement of education in Alabama and asked him to suggest where it should go. (*Id.*) He replied: "You may wish to contact the Macon Academy in Tuskegee, Alabama. The academy is a private school which was set up by individuals in Macon County who were not satisfied with the Federal Court order which did away with their rights to run the schools in that County as they saw fit." (*Id.*) There were many more letters like this in the one-and-a-half-inch-thick file. (*Id.*) Governor Wallace also supported white academies in other counties, and he pressured cabinet members to contribute to them. (*Id.* ¶ 105.) His office maintained lists of contributors. (*Id.*)

56. The principal opposition to reform of the property assessment system came from the Alabama Farm Bureau and forestry interests, which began lobbying for a classification system that would protect them from high assessment ratios. (Thornton Dep. at 170-71.) The taxation system of Alabama was supported by the alliance of Black Belt planters and urban industrialists, who continued to protect their private financial interests. (Pls.' Request for Admissions ¶ 91.)

57. When Lurleen Wallace succeeded her husband as Governor, Wallace's Black Belt supporters began to push to protect their property against increased taxes. (Pls.' Request for Admissions ¶¶ 106-07.) An effort to amend the 1901 Constitution to eliminate, once and for all, the century-old requirement of equal assessment and taxation rates, failed. (*Id.*)

58. In 1967, the legislature's Joint Committee on Ad Valorem Taxation issued a report that recommended the establishment of a statewide reassessment program, with professional qualifications required of county boards of equalization and lowering of the fictional sixty percent assessment maximum rate to a more realistic thirty percent. (Pls.' Request for Admissions ¶ 109.) Timberland would be assessed at its bare-land value. Growing timber would be exempt from property taxation, as would be other crops, but a severance tax would be levied on timber when marketed. (*Id.*) There would be no exemptions for machinery or other personal property (for example, autos, boats, airplanes, trucks, and trailers) used in a business. (*Id.*)

59. A report issued by a four-person minority of the interim committee recommended different percentage levels for the assessment of the various classes of property. (Pls.' Request for Admissions ¶ 110.) In particular, it recommended that rural property be assessed at lower levels than other kinds. (*Id.*) Bills reflecting this Farm Bureau Federation perspective were introduced in the Senate on Tuesday in the third week of July 1967, and assigned to the Finance and Taxation Committee. (*Id.*)

60. On August 8, 1967, the Farm Bureau bill was defeated in the House because it failed to win the three-fifths vote required of a constitutional amendment. (Pls.' Request for Admissions ¶ 111.) On August 10, 1967, the House voted to reconsider the Farm Bureau bill, and the motion passed by a vote of seventy-two to sixteen. (*Id.* ¶ 112.) In the bill that finally passed the House, personal property was assessed at twenty percent, business property at twenty-five percent, residential property at twenty

percent, and utilities at forty percent. (*Id.*) Farm land was assessed at the lowest ratio of all, fifteen percent. (*Id.*)

61. In 1967, the legislature ultimately passed a thirty percent cap on property tax assessments plus a number of exemptions that changed virtually nothing. (Pls.' Request for Admissions ¶ 114.) This outcome represented a victory for the rural counties despite the fact that the legislation did not contain property categories. (*Id.*)

62. Although the legislation did not propose to amend the 1901 Constitution to establish the separate property tax classes the Farm Bureau forces had wanted, it did formally repeal the sixty percent uniform assessment ratio, capping all property assessments at thirty percent of fair market value and granting state and local tax officials wide discretion in the setting of ad valorem assessment rates. (Pls.' Request for Admissions ¶ 117.) This assured that local officials would not increase taxes significantly. (*Id.*)

63. In 1968, an agriculture study commission, concerned that farmers might be asked to shoulder property taxes at rates comparable to what others were paying, proposed to change Alabama law to provide that assessments be based on current use and not the market value of property. (Pls.' Request for Admissions ¶ 119.) The governor at that time, Albert Brewer, focused on a county's tax effort and ability to pay measured by the county's mean per-capita income compared to the mean per-capita income of the state. (*Id.* ¶ 120.) Thus, a relatively poor county making a relatively strong effort to support its schools would be rewarded with extra state funds; likewise, a relatively wealthy county doing a below-average job of supporting its schools would be denied some funds even if

it raised more taxes than the poorer county. (*Id.*) The plan gave counties two years to bring their tax systems up to the state standard and gave county commissions the power to propose tax increases to their electorates. (*Id.*)

64. The urban bloc began a filibuster in the Senate on April 15, 1969. (Pls.' Request for Admissions ¶ 121.) Its proximate target was the bill to create the Alabama Commission on Higher Education ("ACHE"), but it could have been any bill. (*Id.*) The urban bloc had tried to wring concessions on property tax equalization out of Governor Brewer in the House and wanted funding distribution formulas closer to a per student basis. (*Id.*) Governor Brewer favored property tax equalization, but he feared that it would not get through the special session and that it would probably tangle up his other bills as well. (*Id.*) The Achilles' heel in the urban bloc's Senate filibuster, however, was that urban legislators favored much of Governor Brewer's education program. (*Id.* ¶ 122.) They knew or suspected that in 1970 he would be competing for reelection against George Wallace, who would not support property tax equalization. (*Id.*) To embarrass Brewer too much with their filibuster would consequently be counterproductive. (*Id.*) Notwithstanding doubts about the usefulness of Governor Brewer's new minimum standard property tax bill with its penalty provision, urban legislators supported it, and in 1969 it passed the legislature and was signed into law. (*Id.* ¶ 123.)

65. By 1971, two years following enactment, when the penalty provision of the law was scheduled for implementation, few underassessed counties had acted to bring themselves up to the state norm. (Pls.' Request for Admissions ¶ 124.) Some counties had tried but failed to win the

taxpayers' approval. (*Id.*) In all, thirty-nine counties stood to lose funds. (*Id.*)

66. In 1971, a three-judge federal court in *Weissinger v. Boswell,* 330 F.Supp. 615 (M.D.Ala.1971) (3-judge court), held that the 1967 statute violated both the federal and state constitutions. (Pls.' Request for Admissions ¶ 125.) Specifically, the *Weissinger* court made the following findings:

> In 1969 the State Department of Revenue commenced an assessment-sales ratio study to determine the ad valorem tax assessment ratio of fair and reasonable market value of real property in each county in the state and to determine the statewide median ratio. The results of this study, the reliability of which is not in issue, reveal that the median ratios for the individual counties in the State of Alabama range from lows of 6.7 and 7 percent of fair market value in rural Hale and Washington Counties to highs of 23.1 and 26.8 percent of fair market value in urban Madison and Jefferson Counties. The study further reveals that the median assessment ratio for the state was approximately 16.9 percent of fair market value.

Weissinger, 330 F.Supp. at 621 (footnotes omitted). The *Weissinger* court further ruled that because the 1967 law had been declared unconstitutional, the thirty percent of market value assessment ratio as provided in that law could no longer be enforced; thus, the court restored the sixty percent ratio set out in the 1935 statute. *Id.* at 625. The court gave the State one year to bring its property tax laws into compliance with the court's equalization mandate. *Id.* Subsequently, because of the difficulties in conducting a statewide reassessment of property, the court

in an unreported order extended to June 29, 1979, the deadline for applying equal assessment ratios for all like property throughout the state. (Pls.' Request for Admissions ¶ 126.)

67. In the meantime, however, George Wallace had defeated Albert Brewer in the 1970 gubernatorial election. (Pls.' Request for Admissions ¶ 127.) Even though only one black legislator, Fred Gray, had been elected in 1970, the three-judge federal court in Montgomery clearly was headed toward new decrees that would more nearly equalize the populations in House and Senate districts and empower additional black voter majorities. (*Id.* ¶ 128.) Property owners were concerned about the prospect of increased property taxes. (*Id.*) Legislative power was already passing to urban areas, where there was much stronger support for property taxes, and where rates were already higher than the rates in rural areas. (*Id.*) Blacks in the cities were better organized politically and were more capable of making their influence felt in the Legislature. (*Id.*) According to Dr. Norrell, "there's no question but that the Sam Engelhardts and the Walter Givhans and the George Wallaces of the world knew exactly that *Reynolds v. Sim[ ]s* and the subsequent reapportionment decisions that followed from that were going to change the nature of the Alabama Legislature to bring African-American representation into that body." (May 4, 2004, Tr. at 108.)

68. Indeed, when he addressed the Regular Session of the Legislature on May 4, 1971, George Wallace expressly linked opposition to tax increases with opposition to federal intervention in affairs of the state:

> Education is still the primary function of State Government, and I believe under existing revenues we can have a teacher salary increase, a

> better free textbook program, a better retirement program which has already been introduced.
>
> Other legislation along this line will be introduced, because I am proud of the fact that during the time I was Governor the first time, a breakthrough in education came. The largest increases at any time because of our interest. But I am frank to tell you, and to tell educators, that the people of Alabama are simply turned off on education and some educators because of what the Federal Courts and HEW have done to their children from Huntsville to Mobile. Every one of you know I am telling you the truth when I tell you that.

(Pls.' Request for Admissions ¶ 129.) Additionally, white hostility toward court-ordered busing was at a peak in 1971, the year of *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and *Davis v. Board of School Comm'rs of Mobile County,* 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971). (May 4, 2004, Tr. at 109-10.)

69. The *Weissinger* decision came down on June 29, 1971, and the Regular Session adjourned without passing either a General Fund or an Education Fund budget. (Pls.' Request for Admissions ¶ 130.) The dissension caused by the issues of legislative redistricting and court-ordered ad valorem tax reform made constructive legislation during the closing days and hours impossible, thus necessitating additional special sessions. (*Id.*) An education budget finally was adopted in a second special session in November 1971. (*Id.* ¶ 131.) A third special session was called to respond to *Weissinger.* (*Id.*) A law was enacted requiring local county authorities to reappraise all property or have it done for them by the State Department of Revenue. Act

No. 160, 1971 Ala. Acts (Third Special Sess.). (Pls.' Request for Admissions ¶ 131.)

70. During that third special session of 1971, the Legislature also passed a bill proposing what became Amendment 325 of the 1901 Constitution: (Pls.' Request for Admissions ¶ 132.) This first Lid Bill was ratified by the voters on June 8, 1972. (*Id.*) Amendment 325 established for the first time separate classes of property for taxation purposes. (*Id.* ¶ 133.)

71. Governor George Wallace expressly linked the federal court's *Weissinger* order to federally court-ordered reapportionment of the Legislature and busing for school desegregation:

> Wallace, in the Fall, August, of '71, threatens to close some schools. This gave him a very powerful issue looking toward the 1972 presidential election, and in that context, when he called for a series of special sessions of the legislature to deal with, he said, reapportionment – they had to act on reapportionment at this exact same time – he called for an anti-busing piece of legislation, which was passed and of course was declared unconstitutional. The same night he called for that, he calls for a lid bill to cap property taxes in Alabama in the context of burgeoning private schools and massive exit from public schools in Alabama because of busing. He says, "we're going – we're going to cap property taxes, make sure that no federal judge" – now, he's talking . . . about his old colleague, college mate, law school mate, Frank Johnson, the man who . . . during Lee versus Macon, the . . . original desegregation case throughout Alabama, he'd said . . . Judge Johnson, needed a barbed wire enema. Well, you

> know, that kind of baiting of federal judges, . . . is applied then to Pointer in Birmingham, to Pittman in Mobile. It's clearly the kind of racial code messages that Wallace has perfected already at this point he applies in Alabama in the fall of 1971 in calling for a shoring up of the caps on property tax which became the Lid Bill.

(May 4, 2004, Tr. at 110.) Wallace "embraced the Alabama Farm Bureau Federation's plan for a graded system. He said he didn't want to get into the details. He just wanted to remind everybody that they shouldn't have to pay any more taxes. This was . . . a mandate of a federal judge or three federal judges, and people shouldn't have to do it in the climate where . . . these same judges are making their children ride hundreds of miles a day on buses." (*Id.* at 115.)

72. The Chairman of the Senate Finance and Taxation Committee when the Amendment 325 bill passed was Walter Givhan of Dallas County, who was at that time head of the White Citizens Council. (May 4, 2004, Tr. at 102.) The result of Amendment 325 was to legalize the de facto classifications in effect when *Weissinger* was filed in 1969. (Pls.' Request for Admissions ¶ 134.) The reappraisal period was stretched over seven years. (*Id.*) The "local option" Amendment 325 authorized counties to vary their assessment ratios and tax rates in a manner carefully constrained to maintaining the status quo. (*Id.* ¶ 135.) Bill Sellers, political commentator for the Mobile Press Register, explained:

> Various technical, legal or constitutional reasons were voiced for the opposition to local option, but some observers feel that the main objection stems from the fact that in a growing number of

> Alabama counties, blacks are gaining control of county governments. Senators representing some of these counties are considered fearful that the black political leaders, who also enjoy voting majorities, will exercise local options and set property taxes at the highest rates possible in order to raise additional funds for their governmental operations. These taxes will be paid by the property owners, considered by the senators to be white owners of large farms and corporate interests with large timberland holdings

(*Id.* (quoting *Mobile Press Register,* Dec. 12, 1971).)

73. The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama Legislature, fair reassessment of all property subject to taxes, and school desegregation, had thus created a "perfect storm" that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students. (May 4, 2004, Tr. at 116.)

74. The provision in Amendment 325 giving the Legislature authority to vary the assessment ratios from county to county, and the laws enacted pursuant to it, Ala.Code § 40-8-1 (1975), were challenged on non-racial equal protection grounds in a separate federal lawsuit filed in Mobile. (Pls.' Request for Admissions ¶ 136.) On April 21, 1978, Judge Hand ruled that the statutory variations of assessment ratios among the counties violated the Equal Protection Clause of the Fourteenth Amendment. *McCarthy v. Jones,* 449 F.Supp. 480, 484 (S.D.Ala.1978). Judge Hand declined, however, to strike down Amendment 325 in its entirety on the theory that it

was possible that the Legislature could vary the assessment ratios among counties in a rational way that met equal protection standards. *Id.* at 485.

75. In the years between passage of Amendment 325 in 1971 and the *Weissinger* court's 1979 deadline, Governor Wallace made an effort to break the statutory earmarking of the Special Education Trust Fund. May 4, 2004, Tr. at 118-20. He was opposed principally by the Alabama Education Association ("AEA"), which had merged with the all-black Alabama State Teachers' Association ("ASTA") and was viewed as a liberal, pro-black lobby. AEA was also one of the opponents of the Lid Bill. (*Id.*) As the statewide reassessment program drew to its conclusion and property assessments were going up, again, the Farm Bureau and industrial interests succeeded in getting the Legislature further to amend the state constitution to preserve the status quo of historically low property taxes. (*Id.* at 120.) In 1978, Governor George Wallace appealed to the legislature to approve new legislation designed to circumvent the effect of *Weissinger v. Boswell* by providing a set of ad valorem tax laws which would produce comparable revenues, both state and local, in the same amounts as those produced before the court mandate. (Pls.' Request for Admissions ¶ 137.) One piece of this package was Amendment 373, an amended Lid Bill, which was adopted in the Second Special Session and ratified in the November 7, 1978, general election by a vote of 313,577 to 205,782. (*Id.* ¶ 138.) Only five counties, Jefferson, Shelby, Walker, Blount, and Wilcox, voted against the measure. (*Id.*)

g. Summary

76. The 1971 Amendment 325, which established the first classification system for property taxes in Alabama history, and the 1978 Amendment 373, which modified the assessment ratios and added a current use provision for farm and timber land, were the products of a series of contemporaneous events that brought to an end the ability of Black Belt whites to control the Legislature and to block increases in local property taxes. All of the those events revolved around the rise of black political power: (1) school desegregation, which undermined support for public schools; (2) court challenges to the widespread under-assessment of property for tax purposes, culminating in the 1971 federal court decree in *Weissinger v. Boswell,* which required uniform property assessments statewide; (3) corresponding pushes by the Farm Bureau and forestry interests to obtain additional constitutional protection from legislative or local tax initiatives; (4) legislative reapportionment resulting in an increase in the number of black legislators, which created a corresponding growing concern on the part of white property owners about their property taxes being raised; and (5) passage of the 1965 Voting Rights Act, re-enfranchisement of blacks, and corresponding litigation challenging racially discriminatory election structures. (Thornton Dep. at 160-80.)

77. There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. (Thornton Dep. at 175-81.) "[T]he fact is, that this is a set of assumptions and a set of institutional relationships and a set of social relationships that . . . is created by historical events, that is historically created and . . . interrelated so that the events feed onto each other and it makes a single

understandable whole." (*Id.* at 174.) The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978. (*Id.* at 178-80; *accord,* Norrell, May 4, 2004, Tr. at 95 ("The limits are always associated with white supremacist intent, and that occurs in 1875, strongly reinforced in 1901, and essentially uninterrupted, unbroken, . . . as main public policy commitments of the state through the 1970's.").)

78. Dr. Norrell agreed with another point Dr. Thornton made in his deposition:

> [A]ll tax policy made or revised in the 20th century has effectively been made to conform with the commitments of taxation capped by constitutional mandate, reinforced by limits on local control, local authority to tax, and that of course was the result of fears, especially among Black Belt counties, that in the future some re-enfranchised black electorate would raise property taxes, the very fear that Sam Engelhardt acted on starting about 1950. And Thornton then takes us into the more modern period and effectively says, you know, these themes continue right through the important policy decisions made with regard to property taxes in 1971 and shored up to an extent in 1978.

(May 4, 2004, Tr. at 95.) Dr. Norrell summarized his testimony as follows:

> [S]tate policies about property taxes were formulated in the context of the racially charged circumstance of Reconstruction and the immediate post Reconstruction years. Those property tax policies

were created to maintain the lowest possible taxation because property taxation is associated with funding for education for black children, and ... that's anathema to this very conservative white supremacist group that gains dominance in 1875, that reinforces and sort of strengthens its structure in the 1901 [constitution], the time at which the vast majority of black voters are taken out of the polity in Alabama, and that those policies of minimal property taxes, of white supremacist control of local government, of minimal support for black education in Alabama are effectively uninterrupted even through the various anxieties and concerns that white supremacists had in Alabama as a result of the coming ... civil rights movement and the reality of the civil rights movement. And even after we think of the modern civil rights movement having succeeded with the Civil Rights Act of '64, the Voting Rights Act of '65, that those same forces are able to further reinforce the historic commitment to minimal property taxation, minimal support for education now because of course it ... means education, desegregated or integrated racial education in Alabama. So, ... it's a story for me and for Thornton of powerful continuities established in 1875 or thereabouts and continuing effectively uninterrupted in the making of policy through 1978, and ... folks in Alabama still live very much under policies that were effectively created in 1875 and continuously reinforced up through the years.

Q. And the 1971 and 1978 lid bills reinforced those same policies?

A. That's right.

(May 4, 2004, Tr. at 120-22.) Indeed, Black Belt and urban industrial interests successfully used the argument that it

is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments. (Thornton Dep. at 211-12.)

B. Continuing Effects of Discrimination

1. Continuing Effect on Tax Policy

79. The Plaintiffs introduced the testimony of Professor Susan Pace Hamill, Professor of Law at the University of Alabama, who has conducted an in-depth study of Alabama's property tax system. *See generally* Susan Pace Hamill, *Constitutional Reform in Alabama: A Necessary Step Toward Achieving a Fair and Efficient Tax Structure,* 33 Cumb. L.Rev. 437 (2002-03) (the "Cumberland Law Review article"); Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics,* 54 Ala. L.Rev. 1 (2002) ("the Alabama Law Review article").

80. In her Alabama Law Review article Professor Hamill empirically documented how Alabama's income, sales, and property tax laws unfairly burden poor and lower-income Alabamians. (May 4, 2004, Tr. at 10.) According to Professor Hamill, Alabama's state and local tax injustice takes two forms: regressive income and sales tax laws overtax poor and lower-income citizens, while grossly inadequate revenues supporting education deny those citizens opportunities to improve their condition. (*Id.*) Professor Hamill's research demonstrates that the property tax provisions are the primary force driving both injustices. Alabama Law Review Article at 11-20.

81. Alabama's per capita property tax and revenues are the lowest of all fifty states – the State collects only $250 in property taxes per person. Alabama Law Review Article at 20 n. 50. Prof. Hamill writes:

> The nationwide average of property tax collections per capita imposed at the state, county, municipal, and school district levels, exceeded Alabama's per capita property tax collections by more than three times. The top three ranked states in the nation collected over six times more property tax per person than Alabama, and among the Southeastern states, Florida collected almost four times, while Georgia collected almost three times more property taxes per person than Alabama. Mississippi, North Carolina, South Carolina, Tennessee, and Kentucky each collected around twice as much property tax per person as Alabama.

Id. at 20-21 (footnotes omitted).

82. Moreover, Alabama collects approximately fifty percent less state and federal revenues from all sources than does the average state in the United States, with property taxes making up as little as five percent of Alabama's revenue sources. Alabama Law Review article at 10 n. 9, 22-23. More than half of Alabama's tax revenue is collected through sales tax, which reaches as high as eleven percent in some areas of the state. *Id.* at 18 n. 43, 19-20, 84-85. Professor Hamill testified that in addition to imposing the harshest burdens on the poorest Alabamians, Alabama's over-reliance on sales taxes supports the conclusion that inadequate property taxes cause Alabama's inadequate revenues. (May 4, 2004, Tr. at 14-15, 32.) Specifically, because most rural and low-income counties have small commercial sales bases, sales taxes

will never raise adequate revenues to meet minimum needs, including educational needs. (*Id.*) According to Professor Hamill, the state's low revenues demonstrate that a greater reliance on sales taxes cannot compensate for disproportionately low property taxes. (*Id.*)

83. Professor Hamill also identified the two principal mechanisms in the 1901 Constitution that restrict property taxes: (1) the constitutional cap on millage rates at the state and local levels, and (2) the Lid Bill (Amendments 325 and 373) that imposes absolute dollar amount limits on the amount of tax as a percentage of fair market value, entrenches low assessment ratios for separate classifications of property, and mandates a low current use valuation for timber and farm land. (May 4, 2004, Tr. at 16-18.) In particular, the Lid Bill, by constitutionally keeping the property tax base at a mere fraction of the property's value, guarantees that no level of millage rates will produce minimally adequate property taxes. (*Id.* at 20-22.)

84. As way of example, property tax revenues from timber lands, which constitute seventy-one percent of Alabama's geographic land mass, average less than $1.00 per acre and account for only two percent of all property tax revenue. (Pls.' Ex. 56; May 4, 2004, Tr. at 22-25.) Further, an increase in millage rates alone would not increase the proportion of the property tax revenue derived from timber. (May 4, 2004, Tr. at 27.) Thus, even with greater millage rates, timber land would still provide merely two percent of revenue derived from property tax.

85. The low assessment ratios are also evident when comparing fair market and current use value of property types with the effective assessed value. For instance, the

state net assessed value of Class III property, which includes timber, farms, and personal residences, is just under $10 billion, whereas the fair market and current use value of that same property exceeds $120 billion. (Pls.' Ex. 111.) In other words, the state net assessed value of Class III property is 8.33 percent of its fair market and current use value. (*Id.*) Similarly, the state net assessed value of Class I property, utility property, is twenty percent of its fair market value; for Class II property, business property, the state net assessed value is 18.11 percent of its fair market value; and for Class IV property, motor vehicles, the state net assessed value is approximately thirteen percent of its fair market value. (*Id.*) If assessment ratios for the foregoing classes of property were set at thirty percent, approximately an additional $1.68 billion would be generated. (May 4, 2004, Tr. at 159.) Likewise, if assessment ratios were set at a 40/30 percent hybrid system, an additional $2.29 billion would be generated. (*Id.*) Under an assessment ratio of sixty percent, as was threatened in *Weissenger* [sic], an additional $5.09 billion would be raised. (*Id.*) Moreover, those additional revenues would be higher if agricultural and timber land were taxed at some amount other than "current use." (*Id.*)

86. Dr. Daniel J. Sullivan, economic expert for Plaintiffs, concluded that the implications of Alabama's unique constitutional property tax structure are: (a) the combination of limits on assessment ratios and millage rates makes the capacity of property tax much lower in Alabama than in any other state; (b) the decision-making process is much more cumbersome in Alabama than it is in other states, making change efforts far more difficult; (c) because virtually all changes people seek regarding the property tax are efforts to increase it, the cumbersome

process in Alabama results in Alabama continuing to fall farther behind other states; (d) the decision-making process also contributes to Alabama's tax system being one of the least efficient and least equitable in the nation; and (e) the greater difficulty in making changes, relative to other states, has the effect of preserving the past and preserving any inequities that result from social values and public priorities that were in place at the time the structure was established. (May 5, 2004, Tr. at 79-81.)

2. Effect on Funding for Public K-12 and Higher Education

87. The effect of low property tax revenues has had a crippling effect on poor, majority black school districts. (May 4, 2004, Tr. at 27-30.)

88. In rural areas of the state, most local school districts simply do not have a critical mass of valuable commercial property and residential homes – the two types of property shouldering eighty-five percent of the property taxes – to raise adequate funds for public education. (May 4, 2004, Tr. at 31-32.) Moreover, in areas where the significant source of wealth is timber, the property tax structure bars taxation above ten percent of the current use value of such areas; consequently, that property does not provide much property tax revenue. (*Id.*; Pls.' Ex. 57.)

89. Indeed, even areas boasting valuable commercial and residential property have difficulty in raising adequate revenue because of the Lid Bill's low assessment ratios for all property classifications. (May 4, 2004, Tr. at 32-34.)

90. Dr. Ed Richardson, Interim President of Auburn University and former Alabama State Superintendent of Education, testified at his deposition regarding the effect of the lack of funding on K-12 and higher education. Dr. Richardson testified that the tuition at Auburn University will likely increase by nine percent next year, the tuition at JSU will likely increase fourteen percent next year and the tuition at ASU will likely increase twenty percent next year. (Dep. of Ed. Richardson at 21, 45-46.) Dr. Richardson also testified that if tuition at Alabama's state public universities continues to increase at a rate of eight to twelve percent per year, families with household incomes less than $20,000, as well as those with incomes of $40,000 to $50,000 per year, will be unable to afford college. (*Id.* at 13-14.)

91. Dr. Richardson also testified that the State Department of Education conducted studies indicating a strong correlation among black students, poverty, and low achievement scores. (Richardson Dep. at 18-20.) Those studies also indicated that a high correlation exists among large black enrollments, high percentages of students eligible for subsidized lunches, and high schools placed on academic watch by the State Department of Education. (*Id.* at 19-21.) Indeed, of the forty-four Alabama high schools placed on academic watch[2] in 2002, most had both black student majorities and above average percentages of students participating in the reduced lunch program. (*Id.* at 21.) Additionally, although forty percent of the students enrolled in Alabama public school were non-white, only

[2] High schools are placed on academic watch when less than eighty percent of graduates pass the exit exam administered by the State Department of Education. (Richardson Dep. at 15-16.)

thirty-five percent of high school graduates were non-white. (*Id.* at 33.)

92. Lack of state funding has also adversely impacted funding for financial aid, which disproportionately burdens poor, black families. Dr. Richardson testified at his deposition that because poor families do not have the ability to assume large indebtedness, those families are increasingly unable to attend institutions of higher education as financial aid remains stagnant while student indebtedness rises. (Richardson Dep. at 28-31.)

93. Additionally, financial aid for students at Alabama's colleges comes almost exclusively from federal Pell grants,[3] which do not cover living expenses; consequently, low income students who receive federal financial assistance must incur substantial debt or find work. (Richardson Dep. at 28-31.)[4]

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[3] Pell grants are entirely a need-based program and are the largest federal grant program. The only component of merit to Pell grants is that the student must have graduated from high school or have a GED, and once enrolled in college, the student must maintain satisfactory progress as defined by the institution, which is generally a minimum grade point average. (May 5, 2004, Tr. at 165.)

[4] Dr. Carlos Clark, Director of Financial Aid at AAMU, testified that seventy-six percent of the 6,588 students at AAMU receive some sort of financial aid, which includes student loans, grants, scholarships, and work. (May 5, 2004 Tr. at 196.) Last year, as many as eighty-eight percent of AAMU students received financial aid. (*Id.* at 208.) This year, total student financial aid at AAMU came to $31 million, compared with $20 million in the 2000-01 school year. (*Id.* at 208.)

Dr. Clark also testified that tuition at AAMU rose 12.5% this year, and it has risen 120% since 1996, when it cost only $920 per semester. (May 5, 2004, Tr. at 209.) Financial aid has failed to offset the increasing tuition and fees. (*Id.* at 209-10.) For instance, AAMU received only $25,000 in state financial aid that it can distribute to its students this

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94. In an effort to assist lower-income students, Auburn University has tapped into its institutional funds to provide merit-based scholarships to students who graduate from "at-risk" high schools. Due to the lack of state funding, Auburn University this year set aside two million dollars of institutional funds for one hundred merit-based scholarships, thirty-six of which are dedicated to students graduating from at-risk high schools.

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year, which it awarded to those students who had exceptional need, defined, according to federal methodology, as those students who had an estimated financial contribution, of zero. (May 5, 2004, Tr. at 196-97.) In total, some 100 students received approximately $200 apiece in state need-based financial aid. (*Id.*)

Federal assistance, in the form of grants, loans, and work-study programs, is limited as well. The maximum federal Pell grant that can be awarded is $2,025 per semester, and the average Pell grant for AAMU students this year was $1,000. (May 5, 2004, Tr. at 197-98.) Three kinds of student loans are available: federally subsidized loans, which are need-based, and unsubsidized student and parent-plus loans, which are credit-based. (*Id.* at 198-99.) There is a sliding scale for subsidized loans: freshmen can receive $2,625 per year; sophomores, $3,500; juniors and seniors can receive $5,500. (*Id.*) AAMU received $461,000 this year from the federal government for campus-based work-study, and it gave $4,800 each to 108 students. (*Id.* at 199.)

AAMU this year also used approximately $4 million of its institutional funds for merit-based scholarships. (May 5, 2004, Tr. at 200.)

AAMU lost 475 students between the Fall and Spring semesters, half of whom gave financial difficulties as their reason for leaving school. (May 5, 2004, at Tr. at 206-07.) Some of these students transfer to a community college that is closer to home and that has substantially lower tuition. (*Id.*) Students who stop out or drop out of AAMU also adversely affect other students' ability to receive financial assistance because students who drop out of AAMU usually default on their student loans, and those defaults reduce the amount of federally subsidized loans AAMU is allowed to make in the future. (*Id.* at 211-12.) Moreover, once a student drops out of AAMU, it is unlikely that he or she will return – only about twenty percent of students who drop out of AAMU ever come back. (*Id.* at 212.)

(Richardson Dep. at 38-40.) While this effort is commendable, the overall impact of those scholarships is relatively small – one hundred students out of the 25,000 that attend Auburn university represents a minute percentage. (*Id.* at 39.) Additionally, smaller institutions whose tuition are increasing do not have the capability to provide similar scholarships. (*Id.* at 42.)

95. Dr. Richardson also testified that as a result of the lack of state funding, faculty salaries at Alabama's state universities are well below regional and national averages, and absent increased state appropriations, tuition must continue to rise to compete to attract high-quality faculty members. (Richardson Dep. at 46-47.)

96. Dr. Richardson also identified two aspects in which the underfunding of K-12 public schools in Alabama has a negative impact on access to higher education: (1) the lack of financial resources results in lower academic achievement in K-12 and less likelihood of success in higher education; and (2) the lack of financial resources prevents poor school systems from offering college preparatory curriculums. (Richardson Dep. at 51-54.) According to Dr. Richardson:

> What we have found is that based on disaggregation of test scores, that the most critical variable in terms of success in school is poverty. In other words, higher poverty, less success. And what we have found are for students that are in schools that are not well funded, they do not have access to advanced classes that would be required to have a good chance of success at Jacksonville or Alabama State or Auburn. So all of those contribute to a high probability of lack of success.
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> . . .

> What you have are schools that have good local funding would be able to offer advanced placement courses, foreign language courses, higher level math, and in many cases the classes would be smaller and offered on a regular basis. So those students then would be able to take four years of aggressive mathematics. As I previously mentioned, mathematics seems to be the subject that creates most problems for students. So I would just say that the schools with less funding are less able to offer advanced courses that would be instrumental in a student's success in college.

(*Id.* at 52-54.)

97. In 2003, Alabama spent $5,908 per K-12 student, compared with a national average of $7,376 per student. (Richardson Dep. at 55-56; Pls.' Ex. 36 (Editorial, *Mixed Bag: There's a Reason Schools Struggle to Maintain,* al.com (January 12, 2004)).)

98. One illustration of the strained education budget is Alabama's funding for textbooks:

> I think we have 128 school systems now, or 129 perhaps, but 80 of that number used its textbook monies to some degree to avoid layoffs. In fact, we have had several school systems, 20 some-odd if I remember correctly, that had not purchased textbooks in three years. Now, you have to keep in mind, what's the problem. Well, they have kept the textbooks they have for six years already, so you add three more years on top of that. So you have got textbooks you have been using for nine years. Obviously the condition is bad, pages missing, and in some cases dated, you know, like science and social studies. So that was a tremendous impact, had a tremendous impact,

> and it was reflective of school systems that had low local support as well.

(Richardson Dep. at 58-59; Pls.' Ex. 37 (Regan Loyola Connolly, *State BOE Closes Books on New Texts,* Montgomery Advertiser (September 12, 2003)).)

99. Additionally, the current underfunding of K-12 public schools has almost entirely eliminated state appropriations for textbooks and remedial programs for students who fail the high school exit exam. (Richardson Dep. at 59-60, 70.)

100. According to Dr. Richardson, by the 2004-05 school year the reserve funds of 100 of the 128 public school systems in Alabama will have been depleted. (Richardson Dep. at 71.)

101. According to a February 23, 2003, "report card" released by the Alabama Board of Education, a "tremendous gulf" exists among differing racial and socioeconomic groups in Alabama. (Richardson Dep. at 67; Pls.' Ex. 38 (Ken L. Spear, *Cash Woes Tax Schools,* Montgomery Advertiser (Feb. 28, 2003)).) The test scores of whites in Alabama's K-12 schools placed them in the 65th percentile nationwide, Hispanics were in the 46th percentile, and blacks in the 39th percentile. (Richardson Dep. at 67; Pls.' Ex. 38 (Ken L. Spear, *Cash Woes Tax Schools,* Montgomery Advertiser (Feb. 28, 2003)).) Likewise, students receiving a free or reduced-price lunch, a common indicator of poverty, ranked in the 40th percentile nationwide, while students who paid for their lunches scored in the 67th percentile. (Richardson Dep. at 75-76; Pls.' Ex. 38 (Ken L. Spear, *Cash Woes Tax Schools,* Montgomery Advertiser (Feb. 28, 2003)).)

102. Importantly, more than a third of Alabama's college freshmen are not prepared for college level classes, and the number is rising, even though high school graduation exam scores and some elementary scores are improving. Last school year, thirty-five percent of freshmen at the state's public colleges and universities were enrolled in remedial courses. (Richardson Dep. at 76-77; Pls.' Ex. 39 (Regan Loyola Connolly, *Students Lack Readiness for College,* Montgomery Advertiser (Feb. 27, 2004)).) Dr. Richardson expressed concern about the high percentage of college freshman enrolled in remedial classes because "Alabama has the most rigorous requirement for high school graduates of any state in the nation. We require more math and science than any other state. And for us to have that level of remediation was just rather shocking to me." (Richardson Dep. at 77.) Poor school systems must also meet the State Department's minimum requirements, but, according to Dr. Richardson, basic problems cannot be overcome without adequate funding: "The problem is, is that you have, in many cases, difficulty securing teachers with advanced math certification or science in some of your poor and rural – rural really drives that about as much as anything." (*Id.* at 77-78.)

103. During the past few years, Alabama's K-12 students had been making "tremendous progress" increasing their standardized test scores, but recent budget cuts have made that progress "unravel." (Richardson Dep. at 79-80.) For instance, in the past year, the average high school dropout rate for Alabama students was fourteen or

fifteen percent, but for black students it was "around the 20 percent range." (*Id.* at 81.)[5]

104. In 2002, the State Department of Education, responding to the mandate of the state court Equity Funding Case to make a recommendation to the Legislature, performed an analysis that indicated an additional $1.6 billion annually is needed to provide "adequate"[6] K-12

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[5] The dropout rates are calculated by the Alabama State Department of Education by extrapolating the ninth grade attrition rate forward four years, which may result in an overestimation of students actually graduating. (Richardson Dep. at 84-89; Pls.' Ex. 41 (Vicki McClure, *State Dropout Data Misleading,* The Birmingham News (March 12, 2004)).)

[6] Dr. Richardson explained the careful methodology the State Department used to calculate what would constitute adequate K-12 funding in Alabama:

> We made a two-year study on every single aspect of education's operation. All right. Just to give you a couple of examples. . . . We went in and we looked at utility bills for schools that we felt were adequately heated and cooled, and averaged those out. We looked at the laws on the books, what does it require for special education? We looked at how much it costs to transport students. That was required. We looked at even how much money teachers are having to spend beyond the supply money that they were allocated. We went out and looked at bills and invoices. It took us about two years. So we could tell you three years ago how much it costs to meet existing state laws, and to meet existing costs in Alabama. We didn't compare ourselves to Tennessee or anything else, just what it costs in Alabama. Just to meet existing state laws and to meet the actual cost of operation.

(Richardson Dep. at 94-95.) Dr. Richardson additionally explained why the State Department's calculation should satisfy any reasonable legal or legislative definition of adequacy:

> We believed that in order to go to the legislature and say, what is adequacy? You know, everybody has a different definition, like dropout rate, it's adequate one place, it's not

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education in Alabama. (Richardson Dep. at 94-111.) As of 2004, Dr. Richardson estimates that figure is closer to $2 billion. (*Id.* at 111.)

105. Dr. Richardson concurs with the following opinions expressed by Dr. William Muse in a letter to the editor Dr. Muse wrote when he resigned as President of Auburn University and accepted a position at East Carolina University: (1) Alabama has been hampered by a tax structure that is both inequitable and inadequate; (2) the tax structure places a disproportionate burden on the poor through an over-reliance on sales taxes and does not produce sufficient revenues to fund education, both elementary and secondary and higher education, on levels comparable to that of other Southern states; (3) a critical and necessary step in the process will be rewriting the state's antiquated constitution, because so many of the obstacles to progress, particularly the tax structure, are written into the constitution; and (4) one of the most important changes needed in Alabama is a substantial increase in property taxes because in Alabama, the property tax revenue is so low the state has to pick up the bulk of the cost of the public schools from regressive sales and income taxes; moreover, inasmuch as higher education is

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> adequate somewhere else. So we felt like we would just look at the actual cost of what does it cost to maintain the building, what does it cost to sweep the floors, the whole thin[g], and then we would then go to the legislature because we felt like that's eventually where we were going to have to go. Or, if it was picked up by an appellate court, then they would say, all right, we agree that adequacy is required. How much does it cost in Alabama? And then we could offer those numbers to support our case.

(*Id.* at 96-97.)

funded from the same source as K-12, the monies available to higher education are substantially reduced. (Richardson Dep. at 105-11; Pls.' Ex. 46 (William V. Muse, *State Should Heed North Carolina's Example,* Montgomery Advertiser (Jul. 8, 2001)).)

106. Dr. Sullivan similarly testified that because the ETF funds both K-12 schools and public colleges and universities, the constitutional constraints on property taxes have required an increasing share of the ETF to be allocated to K-12 schools, so that less state funds are available to public colleges and universities. (May 5, 2004, Tr. at 83-84.) According to Dr. Sullivan, if higher education's share of the ETF had remained constant over the last ten years, public colleges and universities would have received nearly $200 million more than those institutions actually received. (Pls.' Ex. 71 (chart depicting amount, distribution, and change in ETF revenues from 1990-91 to 2002-03).) That decline is most significant in the years following 1995 when the State implemented a new foundation program for K-12:

> In terms of the specific issues related to the impact of the property tax and the relationship between K-12 funding and higher ed. funding, that relationship got a lot tighter after the foundation program was passed in '95, and so that . . . starting 95-96 and then coming forward, that's where you start to see this sort of steady downward trend. And I would call . . . to the court's attention [that] we already have a difference which amounts to as much as 200 million dollars between what would have been generated by the share a few years ago and what would be generated by it today. . . . [T]he trend is fairly steadily in the downward direction, and . . . so one might

> anticipate that, absent any change, the higher ed. share could continue to decline.

(May 5, 2004, Tr. at 85-86.)

107. Dr. Sullivan identified that an important consequence of the reduction in the share of ETF revenue appropriated for higher education has been that the gap between what the State appropriates and what ACHE defines as the "need" for the senior institutions, based on the median funding of the SREB[7] region, continues to widen. (May 5, 2004, Tr. at 86-88.) Since this case was tried in 1990, Alabama's state appropriations to senior institutions have declined from 84.1% of the ACHE regional standard to 55.8% of the ACHE regional standard. (*Id.* at 88; Pls.' Ex. 72 (chart demonstrating relationship between ETF appropriation for senior institutions and need, as measured by the ACHE standard).) In real dollars, these percentages represent a difference of over $650 million between Alabama's state appropriations and the regional standard of need and $400 million less than the 84% level of need that was being met during the 1990 trial. (May 5, 2004, Tr. at 89.) Moreover, "these data understate the magnitude of that drop because beginning in 95-96 the appropriation includes the retirement benefits that weren't in there in the early years that were separately appropriated. So that we've got some amount of money, somewhere perhaps between 50 and 100 million dollars, that's now imbedded into that – this higher ed. appropriation that wasn't there in the earlier years." (*Id.* at 88.)

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[7] Southern Regional Education Board, whose member states currently include sixteen Southeastern states.

108. Dr. Sullivan testified that senior institutions having to cope with budgets that represent a smaller fraction of their need have been adversely impacted in two ways: (1) the institutions have been unable to increase salaries as fast as institutions in other states and thus have fallen further behind their SREB counterparts and the United States as a whole (May 5, 2004, Tr. at 89-90); Pls.' Ex. 74 (chart indicating median household in SREB states); and (2) the institutions have been forced to dramatically increase in tuition (May 5, 2004, Tr. at 91).

109. Although the dramatic increase in tuition is certainly not unique to Alabama, the results of the tuition increase are more burdensome in the State because (1) there is not a corresponding increase in need-based scholarship funding to ensure continued access for students from lower income households, and (2) the percent of students in Alabama who would be eligible for such aid (using federal guidelines) is well above average. (May 5, 2004, Tr. at 91-99; Pls.' Exs. 74, 76 (chart comparing need-based financial aid from state sources for students at public institutions) & 77 (chart indicating Pell grant funding in United States, SREB States, and Alabama from 1990-91 to 2000-01).) Those circumstances place considerably more of the burden of increased tuition on low-income students. (May 5, 2004, Tr. at 92.) That is, compared to the situation in other states, it is becoming relatively easier for wealthy students to attend a state university in Alabama and relatively more difficult for poor students to do so.

110. Dr. Henry C. Mabry, III, who heads a private consulting firm in Montgomery, Alabama, also testified with respect to decreasing appropriations for higher

education and the rising cost of tuition. (May 4, 2004, Tr. at 133.)

111. Operations and Maintenance ("O & M") is a phrase referring to the universities' core spending and not the actual spending for the total operation of the university. (May 4, 2004, Tr. at 165.) O & M includes salaries, benefits and other kinds of maintenance costs, repairs, utilities, and recurring expenditures. *Id.* O & M does not include one-time appropriations or spending that would not be comparable from one university to another, such as agricultural extension and research funds which may be unique to Auburn but not applicable to the University of West Alabama.[8] (*Id.* at 166-67.)

112. From Fiscal Year ("FY") 1990 through FY 2003, O & M appropriations to universities in Alabama increased from about $500 million to $800 million, while federal funds grew from $200 million to a little over $600 million and tuition and fees grew from about $216 Million to about $613 Million. (Pls.' Ex. 124 (graph indicating key revenue sources for universities).) In other words, over thirteen years, federal funds and tuition and fees have increased by close to two hundred percent, while O & M appropriations by the legislature to universities increased by only sixty percent. (*Id.*) Alabama state appropriations

[8] While the University of South Alabama and the University of Alabama both have medical schools, the expenditures for hospital related appropriations are not included in O & M as seen on the chart compiled by Dr. Mabry that depicts key revenue sources for Alabama's public universities. (May 4, 2004, Tr. at 167; Pls.' Ex. 124 (chart indicating sources of revenue for Alabama universities).) Dr. Mabry focused instead on the non-hospital related appropriations.

to higher education clearly have not kept pace with other key revenue sources. (*Id.*)

113. The difference between university O & M contributions that have been made from the ETF and instruction, research, and public service expenditures has widened between FY 1990 to FY 2003. (Pls.' Ex. 127 (graph comparing core university spending and ETF O & M appropriations).) "The trend is continuing to widen between the amount that is appropriated to higher education for operations and maintenance and the expenditures in these key academic . . . and service areas: instruction, research, and public service. . . ." (May 4, 2004, Tr. at 168-69.)

114. The total EFT [sic] expenditures for higher education have also decreased from 28.5% of total ETF appropriations to 26.1% of ETF appropriations. (May 4, 2004, Tr. at 173-175.) Additionally, although the amount appropriations to higher education from the EFT [sic] has increased between FY 1990 and FY 2003, appropriations for K-12, as expected, have grown more quickly. (*Id.* at 178-79); Pls.' Ex. 132 (indicating percentages and actual amounts of appropriations for K-12 and higher education from ETF.)

115. Dr. Donald E. Heller, Associate Professor and Senior Research Associate at the Center for Study of Higher Education, Pennsylvania State University, is the editor and/or author of numerous scholarly works concerning, among other things, issues of access to higher education, including *Condition of Access: Higher Education for Lower Income Students* (2002) and *The States and Public Higher Education Policy: Affordability, Access, and Accountability* (2001). (Pls.' Ex. 90 (curriculum vitae of Dr. Heller).)

116. Dr. Heller testified that the underfunding of public education in Alabama, the resulting rising tuition and fees at its public universities, and the declining or disappearing availability of need-based state and institutional financial aid seriously impact black Alabamians in particular, as well as other low and middle income students, making it increasingly more difficult for those students to have access to enrollment in and completion of higher education. (May 5, 2004, Tr. at 161.)

117. Dr. Heller testified that a "long and extensive body of research" in the United States has established that two paths exist to ensuring access to higher education for low and middle income students, and that Alabama's lack of funding is erecting roadblocks to those paths. (May 5, 2004, Tr. at 161-62.) The first path is to offer universally low tuition, which historically is what has been done in most public colleges and universities in the nation. (*Id.*) The second path, in the absence of low tuition, is to offer need-based financial aid, which acts to lower the cost of education for students who are recipients of that aid. (*Id.*) As tuition increases, poorer students are less likely to be able to enroll in college; likewise, poor students who are already enrolled face dropping out when tuition increases. (*Id.* at 162-63.) Need-based financial aid can protect poorer students from the adverse affects of higher prices – *i.e.* as tuition goes up, need-based financial aid is directly related to whether or not poorer students are going to enroll in college and to persist and obtain a baccalaureate degree. (*Id.*)

118. The research is consistent with respect to those findings, and there is no reason to believe that the situation in Alabama would be any different from that in the rest of the country. (May 5, 2004, Tr. at 163.)

119. Blacks in Alabama have a great deal of financial need in order to be able to attend college, in comparison to white Alabamians and also in comparison to blacks residing in other states. Although students in about half of all families in the country qualify for Pell grants, the rough cutoff being about $45,000 annually in household income, keeping in mind that other factors related to net wealth and need are taken into account in calculating Pell grant eligibility, in Alabama fifty-eight percent of the white households and about seventy-eight percent of the black households would qualify for federal need-based Pell grants. (May 5, 2004, Tr. at 164-65; Pls.' Ex. 91 (Income Distribution of Alabama Households by Race, 2000 Census).) "So, the message here again is that blacks [in Alabama] are both poorer than whites overall and have higher need for financial aid and assistance to pay for college as well as being poorer than the rest of the nation." (May 5, 2004, Tr. at 165.)

120. Alabama has been increasing tuition at rates very consistent with most of the rest of the country, in the range of five to fifteen percent per year. (May 5, 2004, Tr. at 167; Pls.' Exs. 92 (graph indicating annual change in tuition and fees for comprehensive colleges) & 93 (graph indicating annual change in tuition and fees for flagship universities).) "Unfortunately, over the last dozen years in this country we've greatly increased the cost of public higher education to students, and Alabama is no different than the rest of the country in effect." (May 5, 2004, Tr. at 167; Pls.' Exs. 92 & 93.)

121. The principal difference between Alabama and many other states, however, is that Alabama has decreased its amount of spending on need-based financial aid in the face of skyrocketing tuition costs. (May 5, 2004,

Tr. at 169-70; Pls.' Ex. 94 (graph comparing Alabama's state spending on need-based grants per 19-24 year old to other regions of the United States).)

122. Alabama started from a much lower base than did any other part of the country, ranking, in 2001, forty-sixth out of fifty states in spending on need-based aid, and it actually decreased the amount of spending by a little over a third over those eleven years. (May 5, 2004, Tr. at 169-70; Pls.' Ex. 94.)

123. During 2003-04, the State appropriated only about $800,000 for need-based financial aid. (May 5, 2004, Tr. at 174.) For the period 1991 to 2001, with the exception of one year, 1997, the increase in tuition at Alabama's comprehensive public universities and at the University of Alabama, on a percentage basis, has been higher than the increase in state need-based financial aid. (May 5, 2004, Tr. at 173; Pls.' Ex. 95 (graph entitled Actual Change in Tuition and State Need-Based Grant Spending Per 18-24 Year Old – Alabama).) In fact, there are seven years in which the State actually cut spending on financial aid. (May 5, 2004, Tr. at 173; Pls.' Ex. 95.) In contrast, in all but three of those years, the other Southeastern states increased need-based financial assistance at a greater rate than tuition was increased. (May 5, 2004, Tr. at 174; Pls.' Ex. 96 (graph entitled "Annual Change in Tuition and State Need-Based Grant Spending Per 18-24 Year Old-Other SREB States").)

124. Alabama's lack of funding for need-based student aid has also had an adverse effect on federal funding. Because the state's level of funding has not achieved a certain level, the State of Alabama must turn back matching funds to the federal government. (May 5,

2004, Tr. at 174.) ACHE's 2002-03 annual report confirms this loss of federal assistance:

> Because the Alabama Legislature during its Special Session in September, 2003 significantly reduced funding for the state's only need-based student aid program that receives federal matching funds, Alabama must return its $446,119 share of federal funds for 2003-2004, as the state no longer meets the required maintenance of effort necessary to qualify for the federal monies. *As a result, Alabama will not receive any federal need-based aid funds for 2003-2004 or 2004-2005.*

(Pls. Ex. 15 at 28 (ACHE October 1, 2002 – September 30, 2003 annual report) (emphasis in original).)

125. The trend of rapidly increasing tuition and steadily decreasing need-based financial aid in Alabama corresponds with a growing gap between white and black Alabama high school graduates enrolling in the state's public four-year institutions of higher education. (May 5, 2004, Tr. at 176; Pls.' Ex. 97 (graph depicting enrollment rate of Alabama high school graduates in four-year public institutions by race, excluding historically black colleges and universities), 98 (graph depicting enrollment rate of Alabama high school graduates in four-year public institutions by race).)

126. Dr. Heller's analysis of scholarships awarded from 1999 to 2003 from the institutional budgets of Alabama's state universities, including ASU and AAMU, shows that for both white and black students, the average institutional scholarship amount given to white students has been steadily increasing, from about $500 to about $722, representing a forty-three percent increase in five

years. (May 5, 2004, Tr. at 177-78; Pls.' Ex. 99 (graph depicting institutional scholarships per undergraduate student at Alabama public four-year universities).) Black students, however, received a smaller increase, from $547 to $660, a twenty-one percent increase, with the average institutional scholarship for black students actually dropping in the last three years. (May 5, 2004, Tr. at 177-78; Pls.' Ex. 99.) Thus, even though blacks need more financial aid, whites are on average receiving a greater amount. (May 5, 2004, Tr. at 178 ("At least based on the census data, we know that in Alabama blacks are poorer than whites, and yet whites are receiving more institutional aid in effect.").) Despite the financial barriers to attending college, however, the number of black Alabamians attending college continues to grow, even as the gap between whites and blacks increases. (*Id.* at 180.)

127. Dr. Heller emphasized the importance of financial resources to the ability of students to persist and graduate after they have enrolled in college. "Students who stop out of college are much less likely to ever earn a degree than students who enroll as a freshman and persist through, straight through, to get a bachelor's degree." (May 5, 2004, Tr. at 186.) Indeed, research indicates that students who work more than fifteen hours a week are less likely to attain a college degree. (*Id.*) "What happens is: students take a lower course load, they don't put as much time into their studies, they can't get . . . as good grades, can't get the credits they need." (*Id.* at 187.) As a result, those students also lose eligibility for Pell grants. (*Id.*)

128. According to Dr. Heller, the adverse racial impact of Alabama's revenue and funding policies for higher education perpetuates the state's historical official

policies of forcing African Americans into subordinate social and economic roles in the state's civil life:

> [T]he big payoff in labor markets today is actually going to college and getting a bachelor's degree. If you go back a generation or two, the big payoff was the difference between dropping out of high school and getting a high school diploma. Back in the days when, you know, we used to quaintly call it a good middle class wage could be earned by a high school graduate, could go out and get a good job often in manufacturing, often in the public sector, earn a good wage without having to go to college. And in those days a generation or two ago, there wasn't as much of what economists call the college wage premium, the difference between a high school graduate, what he or she earns, and a college graduate. Well, in the last two decades, that college wage premium has increased quite a bit, and what we see today the biggest jump is the difference between that high school diploma now and somebody getting a bachelor's degree. . . . There's not much of a premium in terms of earnings between staying in high school and dropping out of high school, but there's a huge premium when somebody goes on to college and gets a bachelor's degree.

(May 5, 2004, Tr. at 179-80.)

129. Elva Bradley, director of the Center for Teaching and Learning at the University of Alabama (the "Center"), also testified that need-based scholarships have failed to keep pace with the rising costs of higher education. (May 5, 2004, Tr. at 216-17.)

130. The Center provides assistance to students so that they can remain eligible to stay in school, based on

both grade point average and satisfactory academic progress as it relates to financial aid. (May 5, 2004, Tr. at 216-17.) To receive financial aid, students must complete sixty-seven percent of attempted hours as they progress from freshman year to senior year. (*Id.* at 218.) When students fail to meet the sixty-seven percent requirement, the students lose eligibility for Pell grants and federal financial aid. (*Id.*) Students who have lost financial aid may appeal their suspension, and the Center provides assistance in that regard. (*Id.*)

131. Ms. Bradley testified that she estimates forty percent of students who come to the Center for assistance are black, although blacks constitute only fourteen percent of the total student body at the University of Alabama. (May 5, 2004, Tr. at 221.)

III. Conclusions of Law

A. *United States v. Fordice*

1. The *Fordice* Standard

1. In *United States v. Fordice,* 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992), the Supreme Court set forth a three-part constitutional analysis governing higher education desegregation lawsuits to determine "whether a state has fully met its remedial obligation" to dismantle policies and practices that inhibit free choice by students with respect to attending institutions of higher education. *Knight v. Alabama,* 14 F.3d 1534, 1540-42 (11th Cir.1994).

2. The first step requires the plaintiff to show that a policy "challenged as segregative is 'traceable' to decisions that were made or practices that were instituted in the past for segregative reasons, thus rendering it a vestige of

discrimination." *Knight,* 14 F.3d at 1540. Put differently, "[o]nce it is determined that a particular policy was originally adopted for discriminatory reasons, the *Fordice* test inquires whether the current policy is 'traceable' to the original policy, or is 'rooted' or has 'antecedents' in that original policy." *Id.* at 1550.

3. The burden of proof to satisfy the "traceable to" prong lies on the plaintiff: "Where plaintiffs in a lawsuit contend that a state or other public actor has not discharged its duty to dismantle its former system of *de jure* segregated higher education, the burden of proof lies with the charging party to show that a challenged contemporary policy is traceable to past segregation." *Knight,* 14 F.3d at 1540-41.

4. The second step in the *Fordice* analysis requires that if the plaintiff successfully demonstrates that a challenged contemporary policy is traceable to past segregation, the burden next shifts to the State to show that the policy no longer has continuing segregative effects. *Knight,* 14 F.3d at 1541. Upon proving that a challenged policy has no segregative effects, the State "is relieved of its duty to eliminate or modify the policy." *Id.* (citing *Fordice,* 505 U.S. at 738-39, 112 S.Ct. 2727).

5. If, on the other hand, the State is unable to show that the challenged policy has no continuing segregative effects, the State may nevertheless escape liability if "the State show[s] that there are no less segregative alternatives which are practicable and educationally sound." *Knight,* 14 F.3d at 1541; *see also Fordice,* 505 U.S. at 743, 112 S.Ct. 2727 ("[T]he State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if

those policies can practicably be eliminated without eroding sound educational policies."). "This examination of the practicability and educational soundness of possible alternatives or modifications to a challenged policy constitutes the third step in the *Fordice* analysis." *Knight,* 14 F.3d at 1541-42. The state's burden to make such a showing, however, is heavy: "a court should consider the full range of alternative remedies, ... when determining which would achieve the greatest reduction in the identified segregative effects." *Id.* at 1541 (citing *Fordice,* 505 U.S. at 742-43, 112 S.Ct. 2727.)

6. The Eleventh Circuit has succinctly summarized the *Fordice* standard as follows:

> Where plaintiffs show that a current policy is traceable to past segregation, and defendants fail to demonstrate either (1) that the policy, in combination with other policies, has no current segregative effects, or (2) that none of the full range of less segregative alternative remedies are practicable and educationally sound, defendants must adopt the practicable and educationally sound alternatives that will bring about the greatest possible reduction in the segregative effects. "If the state has not discharged [this remedial] duty, it remains in violation of the Fourteenth Amendment."

Knight, 14 F.3d at 1542 (citing *Fordice,* 505 U.S. at 727, 112 S.Ct. 2727).

2. Step One: Whether the Current Property Tax Structure is "Traceable To" Alabama's Prior System of Segregation

7. The Court first considers whether Plaintiffs have demonstrated that the constitutional restrictions placed on the property tax authority of both state and local governments are traceable to Alabama's prior *de jure* dual system.

8. Based on the extensive record before the Court, the Court finds that Plaintiffs have met their burden to demonstrate that the current ad valorem tax structure is a vestige of discrimination inasmuch as the constitutional provisions governing the taxation of property are traceable to, rooted in, and have their antecedents in an original segregative, discriminatory policy.

9. It is clear that the current tax structure in Alabama cripples the effectiveness of state and local governments in Alabama to raise funds adequate to support higher education. The Lid Bill and the low assessment ratios impede and restrict the ability of the State and local governments from raising revenue from taxation of property.

3. "Continuing Effects" Step

10. Plaintiffs having satisfied their burden to show that the current tax structure is "traceable to" *de jure* segregation, the burden shifts to Defendants to show that the challenged provisions of the Alabama constitution do not have a continuing segregative effect. Knight v. Alabama, 14 F.3d at 1541.

11. Defendants contend that the property tax is not related to Alabama's system of higher education – i.e., that no nexus exists between the lack of funds derived from state and local property taxation and the effect on student enrollment decisions. Consequently, Defendants submit, the challenged provisions of the Alabama Constitution do not and cannot have a continuing segregative effect.

12. Plaintiffs contend that a causal nexus does indeed exist, arguing that the lack of property tax revenue has financially strained K-12 schools in Alabama, thereby requiring that the State allocate an increased proportion of the ETF to K-12. As a result of this inequitable distribution, Plaintiffs claim that tuition at Alabama's institutions of higher education has skyrocketed and that funds available for need-based financial assistance have plummeted. Consequently, the ability of poorer students, who are disproportionately black, to attend college is adversely affected.

13. The Court appreciates Plaintiffs' argument, and agrees that the current property tax system in Alabama has a crippling effect on the ability of local and state government to raise revenue adequately to fund K-12 schools. Nevertheless, the Court cannot agree that the property tax structure stymies school choice in such a way that results in an unconstitutional denial of a student's right to make a decision unfettered by vestiges of discrimination.

14. The Court finds that the relationship between the funding of higher education and finding of K-12 is marginal insofar as ad valorem property tax is concerned. Put differently, the effect of the state's inability to raise revenue due to the challenged constitutional provisions is

simply too attenuated to form a causal connection between the tax policy and any segregative effect on school choice.

15. Additionally, although the proportion of the ETF allocated to higher education has fallen since 1990, the actual amount of money paid to higher education has increased from $820,063,882 to $1,160,033,885 over that same period. (Defs.' Ex. 04-004.)

16. Moreover, insofar as Plaintiffs contend that the lack of funding for property taxes somehow works to frustrate the Court's prior remedial decrees, the Court finds that argument unavailing. Rather, the State has unbegrudgingly complied with the Court's remedial decrees, meeting all its obligations as ordered by the Court. Along those same lines, between the 1991-92 and 2002-03 academic years, black student enrollment and graduation rates at HWIs have increased considerably. (Defs.' Exs. 04-001 to 003.)

17. The Court concludes, therefore, that although the ad valorem taxation system in Alabama may be traceable to past discriminatory decisions, Defendants have satisfied their burden to demonstrate that the challenged provisions of the Alabama constitution do not continue to have a segregative effect on student choice.[9]

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[9] The Court expresses doubt that the matter before the Court even triggers *Fordice*. As the Eleventh Circuit stated in *Knight v. Alabama*:

> *Fordice* recognized as having segregative effects policies that "influence student enrollment decisions." In its discussion of several of the *Fordice* plaintiffs' specific challenges to Mississippi higher education policy, the Court offered examples of two broad categories of practices that can inhibit "free choice" by students as to university attendance. The first category comprises policies that have the effect of discouraging or

(Continued on following page)

4. *Hunter v. Erickson*

18. Plaintiffs also argue that the challenged provisions of the Alabama constitution violate the Fourteenth Amendment by restricting blacks' full participation in the political process. Specifically, Plaintiffs contend that those provisions were adopted for the racially discriminatory purpose of restricting the ability of black voters to influence property tax policy through ordinary lawmaking precesses both in the Alabama Legislature and in their local governments, especially in majority-black counties, municipalities, and school districts; therefore, the provisions at issue in the instant Motion unconstitutionally burden the ability of blacks to further their political aims.

> preventing blacks from attending HWIs, examples of which include the maintenance of more stringent admissions requirements for HWIs than for [Historically Black Institutions ("HBIs")]. The second category consists of policies that discourage whites from seeking to attend HBIs, examples of which include: duplication of programs at HBIs and HWIs in the same geographic area; the assignment to HBIs of institutional missions that restrict them to programs of instruction that cannot effectively attract whites; and the failure to fund HBIs comparably to HWIs or to locate high-prestige programs at HBIs. As a result of such policies, disproportionate numbers of whites can satisfy their curricular desires at HWIs, and cannot satisfy them at HBIs, thereby discouraging them from choosing to attend HBIs.

14 F.3d at 1541.

Arguably, nothing currently at issue in this case fits into either of those two categories. Plaintiffs' claims that the State is not funding K-12 adequately and that as a result higher education is receiving a lesser share of the ETF, do not appear to fit the *Fordice* mold, let alone impede black students' free choice in determining which university to attend. The Court has previously imposed the requirements of *Fordice*, and the Court questions whether the issues presently before the Court trigger the application of *Fordice*.

19. Plaintiffs rely principally on *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), in which the Supreme Court struck down an amendment to the Akron, Ohio, city charter that restricted the city counsel's authority to enact an ordinance prohibiting racial, religious, or ancestral discrimination in housing without prior voter approval. *Hunter,* 393 U.S. at 387, 89 S.Ct. 557. All other ordinances, including ordinances preventing housing discrimination on grounds other than race or religion, could be enacted simply with the support of the Akron City Counsel. *Id.* at 389-90, 89 S.Ct. 557.

20. Although the Akron amendment was facially neutral, the real effect of the legislation was to "disadvantage those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Hunter,* 393 U.S. at 391, 89 S.Ct. 557. The Supreme Court further reasoned that "the reality is that the law's impact falls on the minority" in that the amendment "places special burdens on racial minorities within the governmental process." *Id.*

21. Likewise, in *Washington v. Seattle School District No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Supreme Court, following *Hunter,* struck down an initiative that was "carefully tailored to interfere with desegregative busing." *Washington,* 458 U.S. at 471, 102 S.Ct. 3187. In particular, that initiative prohibited school boards from requiring any student to attend a school other than the school nearest or next nearest to the student's residence. *Id.* at 462, 102 S.Ct. 3187. Like the ordinance in *Hunter,* the challenged initiative in *Washington* sought to frustrate attempts to provide legislation, *i.e.* busing for

integration, designed to primarily benefit minorities. *Id.* at 472-74, 102 S.Ct. 3187. The Supreme Court therefore concluded that "[g]iven the racial focus of [the initiative], this suffices to trigger application of the *Hunter* doctrine." *Id.* at 474, 102 S.Ct. 3187.

22. The Court is unpersuaded that the instant case falls under *Hunter* and its progeny. Specifically, unlike the challenged legislation in *Hunter* and *Washington,* Alabama's property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure.[10]

23. Additionally, the purpose underlying the enactment of the legislation in both *Hunter* and *Washington* differs from the instant case. In those cases, the challenged legislation sought to eliminate the possibility of legislation specifically tailored to remedy discrimination and segregation. Here, on the other hand, the challenged constitutional provisions were not ratified with the intent to foreclose legislation specifically tailored to remedy discrimination. Accordingly, the Court does not find that the circumstances of this case trigger the applicability *Hunter* and its progeny.

24. In conclusion, therefore, although the provisions of the Alabama constitution may represent poor public tax

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[10] The Court notes that in 2003, Amendment 1 to the Alabama Constitution, which would have drastically overhauled the state's tax structure, including state and local property taxes, was overwhelmingly rejected by voters. (May 4, 2004, Tr. at 52, 161; May 5, 2004, Tr. at 115.)

policy, the Court finds that those provisions do not violate the Fourteenth Amendment.

IV. Conclusion

ACCORDINGLY, the Court **DENIES** Plaintiffs' Motion for Additional Relief with Respect to State Funding of Public Higher Education.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., ET AL.,

Plaintiffs and
Plaintiff Intervenors,

UNITED STATES OF AMERICA

Plaintiff,

CIVIL ACTION NUMBER: CV-83-M-1676-S

v.

THE STATE OF ALABAMA, ET AL.,

Defendants.

ORDER

(Filed Feb. 10, 2005)

This case is before the Court on the Knight-Sims Plaintiffs' Motion to Alter or Amend Order Entered October 5, 2004, Denying Motion for Additional Relief with Respect to State Funding of Higher Education [3297].

I. Standard Applied to Motion for Reconsideration

The Federal Rules of Civil Procedure do not mention motions for reconsideration. Rule 59(e), however, provides for motions to alter or amend a judgment filed within ten days of the judgment. Fed. R. Civ. P. 59(e). A party may also seek relief from a final judgment pursuant to the relatively strict provisions of Rule 60(b). Fed. R. Civ. P. 60(b). Furthermore, the Court may modify or vacate non-final orders at any point prior to final judgment. Fed. R.

Civ. P. 54(b); *see also Bon Air Hotel Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970).[1]

A motion for reconsideration seeks to invoke a district court's authority to modify or vacate its prior orders. Such authority is committed to the district court's sound discretion. *Summit Med. Ctr. of Ala., Inc. v. Riley,* 284 F. Supp. 2d 1350, 1352 (M.D. Ala. 2003). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly." *Richards v. United States,* 67 F. Supp. 2d 1321, 1322 (M.D. Ala. 1999). Parties therefore may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind. *Summit Med. Ctr.* 284 F. Supp. 2d at 1352. "Instead, courts have recognized three grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice." *Id.* With the foregoing principles in mind, the Court addresses the Knight-Sims Plaintiffs' Motion to Alter or Amend Order Entered October 5, 2004, Denying Motion for Additional Relief with Respect to State Funding of Higher Education.

II. Discussion

In their Motion to Alter or Amend Order Entered October 5, 2004, Denying Motion for Additional Relief with

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[1] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

Respect to State Funding of Higher Education, the Knight-Sims Plaintiffs argue: (1) that in light of the Court's findings of facts in its Order of October 5, 2004, *Hunter v. Underwood,* 471 U.S. 222 (1985), requires that the Court enjoin enforcement of challenged provisions of the 1901 Alabama Constitution; (2) that the Court erred in its application of *United States v. Fordice,* 505 U.S. 717 (1992), and (3) that the Court erred in its application *Hunter v. Erickson,* 393 U.S. 385 (1969).

Turning to the Knight-Sims Plaintiffs' first argument, the Court finds that *Hunter v. Underwood* does not compel the relief that the Knight-Sims Plaintiffs seek. In that case, the plaintiffs challenged the constitutionality of Section 182 of the 1901 Alabama Constitution, which provided for the disenfranchisement of persons convicted of certain crimes, including misdemeanors. *Hunter v. Underwood,* 471 U.S. at 224. The plaintiffs had been convicted of presenting a worthless check, a misdemeanor, and were subsequently blocked from the voters rolls pursuant to Section 182. *Id.* The plaintiffs argued that the provision had been adopted for the purpose of disenfranchising blacks, and that it had that intended effect. *Id.* The Supreme Court agreed, affirming the Eleventh Circuit Court of Appeals' finding that Section 182 had been enacted with the intent and desire to disenfranchise blacks on the basis of race. *Id.* at 229. The Supreme Court also found that Section 182 continued to have a discriminatory effect against blacks. *Id.* at 233. As a result, the Supreme Court concluded that Section 182 violated the equal protection clause of the Fourteenth Amendment, and invalidated that provision of the Alabama Constitution. *Id.*

The Knight-Sims Plaintiffs contend that because the Court has found that the constitutional provisions at issue

in the instant litigation were enacted with a racially discriminatory motivation, it follows that this Court must similarly strike down those provisions. While the Court appreciates the Knight-Sims Plaintiffs' argument, the Court declines that request. Here, unlike in *Hunter v. Underwood,* the Court has found that despite the fact that the challenged constitutional provisions were initially enacted with a racially discriminatory motivation, those provisions do not have a continuing segregative effect on higher education. As the Court found in its Order of October 5, 2004, "the effect of the state's inability to raise revenue due to the challenged constitutional provisions is simply too attenuated to form a causal connection between the tax policy and any segregative effect on school choice." (Order of Oct. 5, 2004, at 85.) Moreover, the Court believes that the relief that the Knight-Sims Plaintiffs request is beyond the scope of this litigation – indeed, as Defendants observe in their Response Brief, this case involves desegregation in higher education; this is not a taxpayer action. The relationship between the challenged constitutional provisions and higher education is simply too attenuated to permit the Court to grant the relief that the Knight-Sims Plaintiffs request. Accordingly, the Court finds *Hunter v. Underwood* inapplicable under the circumstances of this case.

The Court next considers the Knight-Sims Plaintiffs' argument that the Court erroneously applied *Fordice* by limiting "school choice" to a student's decision as to which university to attend. According to the Knight-Sims Plaintiffs, in footnote 9 of its Order of October 5, 2004, the Court misinterpreted *Fordice* by interpreting school choice as simply a student's decision as to which institution of higher learning to attend, rather than viewing student

choice as the ability for students to choose freely "whether to pursue an advanced education and, when the choice is made, which of several universities to attend." *See Fordice,* 505 U.S. at 729. The Knight-Sims Plaintiffs's argument is without merit.

In the Order of October 5, 2004, regardless of the Knight-Sims Plaintiffs' interpretation of footnote 9, it is clear that the Court reached its conclusion based on the Knight-Sims Plaintiffs' failure to show that the ability of black students to attend college, or to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system. (Order of Oct. 5, 2004, at 84-85 (concluding that the segregative effect of the challenged constitutional provisions is too attenuated to support a finding that those provisions violate *Fordice*).) Accordingly, the Court finds this argument without merit.

Finally, the Court addresses the Knight-Sims Plaintiffs' argument that the Court erred in rejecting the Knight-Sims Plaintiffs' reliance on *Hunter v. Erickson* and its progeny. The Knight-Sims Plaintiffs, however, add nothing new to their argument, and the Court does not believe that its rejection of *Hunter v. Erickson,* worked a manifest injustice that requires reconsideration. The Court therefore finds this argument unavailing.

In sum, the Court rejects the Knight-Sims Plaintiffs' requests to amend or alter the Court's Order of October 5, 2004. The Court therefore denies the Knight-Sims Plaintiffs' Motion to Alter or Amend Order Entered October 5, 2004, Denying Motion for Additional Relief with Respect to State Funding of Higher Education.

III. Conclusion

ACCORDINGLY, the Court **DENIES** the Knight-Sims Plaintiffs' Motion to Alter or Amend Order Entered October 5, 2004, Denying Motion for Additional Relief with Respect to State Funding of Higher Education [3297].

IT IS SO ORDERED this the 8th day of February, 2005.

/s/ Harold L. Murphy
HAROLD L. MURPHY, JUDGE
UNITED STATES DISTRICT COURT

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VI, § 601, Civil Rights Act of 1964, 42 U.S.C. § 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

1901 Constitution of Alabama

§ 214

The legislature shall not have the power to levy in any one year a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property within this state.

§ 215

No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of

December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law. The proceeds of taxes levied under said proviso (a) for public building, road, or bridge purposes in excess of amounts payable on bonds, warrants, or other securities issued by the county may be spent for general county purposes, in such manner as the court of county commissioners, board of revenue, or other like county governing body may determine.

§ 216

No city, town, village, or other municipal corporation, other than as provided in this article, shall levy or collect a higher rate of taxation in any one year on the property situated therein than one-half of one per centum of the value of such property as assessed for state taxation during the preceding year; provided, that for the purpose of paying debts existing on the sixth day of December, eighteen hundred and seventy-five, and the interest thereon, a tax of one per centum may be levied and collected, to be appropriated exclusively to the payment of such indebtedness; and provided further, that this section shall not apply to the city of Mobile, which city may from

and after the ratification of this Constitution, levy a tax not to exceed the rate of three-fourths of one per centum to pay the expenses of the city government, and may also levy a tax not to exceed three-fourths of one per centum to pay the debt existing on the sixth day of December, eighteen hundred and seventy-five, with interest thereon, or any renewal of such debt; and, provided further, that this section shall not apply to the cities of Birmingham, Huntsville, and Bessemer, and the town of Andalusia, which cities and town may levy and collect a tax not to exceed one-half of one per centum in addition to the tax of one-half of one per centum as hereinbefore allowed to be levied and collected, such special tax to be applied exclusively to the payment of interest on bonds of said cities of Birmingham, Huntsville, and Bessemer, and town of Andalusia, respectively, heretofore issued in pursuance of law, or now authorized by law to be issued and for a sinking fund to pay off said bonds at the maturity thereof; and, provided further, that this section shall not apply to the city of Montgomery, which city shall have the right to levy and collect a tax of not exceeding one-half of one per centum per annum upon the value of the taxable property therein, as fixed for state taxation, for general purposes, and an additional tax of not exceeding three-fourths of one per centum per annum upon the value of the property therein, as fixed for state taxation, to be devoted exclusively to the payment of its public debt, interest thereon, and renewals thereof, and to the maintenance of its public schools, and public conveniences; and, provided further, that this section shall not apply to Troy, Attalla, Gadsden, Woodlawn, Brewton, Pratt City, Ensley, Wylam, and Avondale, which cities and towns may from and after the ratification of this Constitution, levy and collect an additional tax of not exceeding one-half of one per centum; and,

provided further, that this section shall not apply to the cities of Decatur, New Decatur, and Cullman, which cities may from and after the ratification of this Constitution, levy and collect an additional tax of not exceeding three-tenths of one per centum per annum; such special tax of said city of Decatur to be applied exclusively for the public schools, public school buildings, and public improvements; and such special tax of New Decatur and Cullman to be applied exclusively for educational purposes, and to be expended under their respective boards of public school trustees; but this additional tax shall not be levied by Troy, Attalla, Gadsden, Woodlawn, Brewton, Pratt City, Ensley, Wylam, Avondale, Decatur, New Decatur, or Cullman unless authorized by a majority vote of the qualified electors voting at a special election held for the purpose of ascertaining whether or not said tax shall be levied; and, provided further, that the purposes for which such special tax is sought to be levied shall be stated in such election call, and, if authorized, the revenue derived from such special tax shall be used for no other purpose than that stated; and, provided further, that the additional tax authorized to be levied by the city of Troy, when so levied and collected, shall be used exclusively in the payment of the bonds and interest coupons thereon, hereafter issued in the adjustment of the present bonded indebtedness of said city; and, provided further, that the additional tax authorized to be levied and collected by the city of Attalla shall, when so levied and collected, be used exclusively in the payment of bonds to the amount of not exceeding twenty-five thousand dollars and the interest coupons thereon, hereafter to be issued in the adjustment of the present indebtedness of said city; provided further that the governing boards of said cities, which are authorized to levy an additional tax after the holding of an election as

aforesaid, are hereby authorized to provide by ordinance the necessary machinery for the holding of said election and declaring the result thereof.

§ 269

The several counties in this state shall have power to levy and collect a special tax not exceeding ten cents on each one hundred dollars of taxable property in such counties, for the support and furtherance of education in such manner as may be authorized by the legislature; provided, that the rate of such tax, the time it is to continue, and the purpose thereof, shall have been first submitted to a vote of the qualified electors of the county, and voted for by three-fifths of those voting at such election; but the rate of such special tax shall not increase the rate of taxation, state and county combined, in any one year, to more than one dollar and twenty-five cents on each one hundred dollars of taxable property; excluding, however, all special county taxes for public buildings, roads, bridges, and the payment of debts existing at the ratification of the Constitution of eighteen hundred and seventy-five.

Amendment 325

Classification of taxable property for purposes of ad valorem taxation; taxable property to be taxed by state, counties, municipalities, etc., at same rate; assessment ratios for purposes of ad valorem taxation; increase or decrease of ad valorem tax rate by counties, municipalities, etc.; exemption of state, county and municipal property and property used for religious, educational or charitable purposes from taxation; legislature may provide exemptions from taxation; interpretation of authority for

counties, municipalities, etc., to levy taxes, incur indebtedness, etc., in relation to assessment of property; maximum rate of ad valorem tax in any one taxable year.

(a) All taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:

Class I. All property of utilities used in the business of such utilities,

Class II. All property not otherwise classifed,

Class III. All agricultural, forest and residential property.

(b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:

Class I. 30 per centum

Class II. 25 per centum

Class III. 15 per centum

(c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authority, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes of property defined in paragraph (a) herein and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in paragraph (b) herein, provided, however, that the legislature may vary the ratio of assessed value to the fair and reasonable market value as to any class of property as

defined in paragraph (b) herein, and provided, further, that the legislature may fix a uniform ratio of assessment of all property within a county defined in paragraph (a) herein as Class II and III and may fix a different ratio of assessment for property defined in paragraph (a) as Class I. Such ratios as herein authorized may vary among counties so long as each such ratio is uniform within a county.

No class of property shall have a ratio of assessed value to fair and reasonable market value of less than 15 per centum nor more than 35 per centum.

(d) A county, municipality, or other taxing authority may decrease any ad valorem tax rate at any time, provided such decrease shall not jeopardize the payment of any bonded indebtedness secured by such tax. When the tax assessor of each county shall complete the assembly of the assessment book for his county for the ad valorem tax year immediately following the adoption of this amendment and the computation of ad valorem taxes that will be paid upon such assessment, he shall certify to each authority within his county that levies an ad valorem tax the amount of ad valorem tax that will be produced by every levy in that year but excluding for this purpose any assessment of property added to the tax rolls of such county for the tax year in which such certification is made that was not included on the tax rolls for the next preceding tax year. If it shall appear that the estimated ad valorem tax receipts from any levy so estimated shall be less than the receipts from the same levy during the next preceding ad valorem tax year, then the levying authority shall increase each tax rate by such millage as is necessary to produce revenue that is not less than and that is substantially equal to that received during such immediately

preceding tax year. It is further provided that any and all millage adjustments shall be made in increments of not less than ½ mill. The adjustment herein required shall be made only one time and shall be made in the ad valorem tax year immediately following the adoption of this amendment.

(e) Any county, municipality, or other taxing authority may increase the rate at which ad valorem taxes are levied above the limit now provided in the Constitution provided that the proposed increase shall have been (1) proposed by the authority having power to levy the tax after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors of the area in which the tax is to be levied or increased who vote on the proposal.

(f) The legislature is authorized to enact legislation to implement the provisions of this amendment, and may provide for exemptions from taxation; provided, however, that any statutory exemption existing prior to the adoption of this amendment shall not be repealed, except by subsequent legislative act, and shall remain in full force and effect.

(g) Wherever any constitutional provision or statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money, or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes such provision shall mean as assessed for county or municipal taxes as the case may be.

(h) Any provision of the Constitution of Alabama to the contrary notwithstanding, ad valorem taxes shall

never exceed 1½% of the fair and reasonable market value of the property in any one taxable year.

(i) The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities and property devoted exclusively to religious, educational or charitable purposes.

Amendment 373

Classification of taxable property for purposes of ad valorem taxation; taxable property to be taxed by state, counties, municipalities, etc., at same rate; assessment ratios for purposes of ad valorem taxation; increase or decrease of assessment ratios by counties, municipalities, etc.; increase or decrease of ad valorem tax rates by counties, municipalities, etc.; maximum amount of ad valorem tax; certain property to be assessed at current use value and not market value; exemption of certain property from ad valorem taxation; interpretation of authority for counties, municipalities, etc., to levy taxes, borrow money, etc., in relation to assessment of property; counties, municipalities, etc., authorized to levy additional ad valorem tax for costs of certain state-wide reappraisal of property.

(a) On and after October 1, 1978, all taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:

Class I. All property of utilities used in the business of such utilities.

Class II. All property not otherwise classified.

Class III. All agricultural, forest and single-family owner-occupied residential property, and historic buildings and sites.

Class IV. All private passenger automobiles and motor trucks of the type commonly known as "pickups" or "pickup trucks" owned and operated by an individual for personal or private use and not for hire, rent or compensation.

(b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate. On and after October 1, 1978, such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value (except as otherwise provided in subsection (j) hereof of such property:

Class I. 30 per centum.

Class II. 20 per centum.

Class III. 10 per centum.

Class IV. 15 per centum.

(c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authorities, all taxable property shall be forever taxed at the same rate. On and after October 1, 1978, such property shall be assessed for ad valorem tax purposes according to the classes of property defined in subsection (a) hereof and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in subsection (b) hereof, except as otherwise provided in subsection (j) hereof and this subsection (such ratios being herein called "assessment ratios"). In connection with the ad valorem taxes that a county,

municipality or other taxing authority is authorized or required to levy and collect pursuant to any provision of this Constitution, for the ad valorem tax year beginning October 1, 1978, any such taxing authority may, subject to criteria established by act of the legislature, by resolution of the governing body of that taxing authority, at any time not later than September 30, 1979, increase or decrease the assessment ratio applicable to any class of taxable property, such increase or decrease to be effective for ad valorem tax years beginning on and after October 1, 1978. If (1) a county, municipality or other taxing authority adjusts an assessment ratio pursuant to the preceding sentence and (2) the receipts from all ad valorem taxes levied by or with respect to such taxing authority during the ad valorem tax year beginning October 1, 1978, exceed by more than five percent, or are less than 95 percent of, the receipts from such ad valorem taxes for the ad valorem tax year beginning October 1, 1977, then at any time not later than September 30, 1980, for ad valorem tax years beginning on and after October 1, 1979, the taxing authority may, subject to criteria established by act of the legislature, by resolution of the governing body of that taxing authority, adjust any assessment ratio applicable to any class of taxable property. On and after October 1, 1979, the governing body of any county, municipality or other taxing authority may, subject to criteria established by act of the legislature, at any time increase or decrease the assessment ratio applicable to any class of taxable property; provided, that any proposed adjustment to an assessment ratio to be made pursuant to this sentence, whether an increase or a decrease, shall have been (1) proposed by the governing body of the taxing authority after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a

majority vote of the qualified electors residing in the taxing authority who vote on the proposal at a special election called and held in accordance with the law governing special elections. No decrease in an assessment ratio pursuant to this subsection (c) shall be permitted with respect to either of the ad valorem tax years beginning October 1, 1978, and October 1, 1979, if such county, municipality or other taxing authority has increased any millage rate under subsection (e) of this section with respect to such ad valorem tax year. The legislature shall enact general laws applicable to all counties, municipalities and other taxing authorities regulating and establishing criteria for the exercise of the powers granted such taxing authorities to adjust assessment ratios as hereinabove provided. Such assessment ratios as herein authorized may vary among taxing authorities so long as each such assessment ratio is uniform within a taxing authority. Any decrease in any assessment ratio pursuant to this subsection shall not jeopardize the payment of any bonded indebtedness secured by any tax levied by the taxing authority decreasing the assessment ratio. Any action authorized by this subsection to be taken by a taxing authority, or the governing body thereof, shall, other than in the case of a municipality, be taken by resolution of the governing body of the county in which such taxing authority is located acting on behalf of such taxing authority.

(d) With respect to ad valorem taxes levied by the state or by any county, municipality or other taxing authority, no class of taxable property shall have an assessment ratio of less than five per centum nor more than 35 per centum.

(e) A county, municipality or other taxing authority may decrease any ad valorem tax rate at any time, provided

such decrease shall not jeopardize the payment of any bonded indebtedness secured by such tax. For the ad valorem tax year beginning October 1, 1978, when the tax assessor of each county shall complete the assembly of the assessment book for his county for that ad valorem tax year and the computation of ad valorem taxes that will be paid upon such assessment, he shall certify to each authority within his county that levies an ad valorem tax the amount of ad valorem tax that will be produced by every levy in that ad valorem tax year but excluding for this purpose any assessment of new taxable property not previously subject to taxation (except "escaped" property as defined by law) added to the tax rolls of such county for the ad valorem tax year in which such certification is made that was not included on the tax rolls for the next preceding ad valorem tax year. Any county, municipality or other taxing authority, at any time not later than September 30, 1979, may increase the rate at which any ad valorem tax is levied by or with respect to that taxing authority above the limit otherwise provided in this Constitution, provided that the amount of the above-described certification of anticipated tax receipts with respect to such tax is less than 120 percent of the actual receipts from such tax for the ad valorem tax year beginning October 1, 1977, such increase to be effective for ad valorem tax years beginning on and after October 1, 1978; provided, that any such millage increase shall not exceed in mills the total of (i) the number of additional mills that is necessary, when added to the millage rate imposed with respect to such tax on each dollar of taxable property situated in the taxing authority for the ad valorem tax year beginning October 1, 1977, to produce revenue that is not less than and that is substantially equal to that received by the taxing authority with respect to such tax

during such immediately preceding ad valorem tax year, plus (ii) a number of additional mills equal to 20 percent of the total mills imposed by that taxing authority with respect to such tax on each dollar of taxable property situated in the taxing authority for the ad valorem tax year beginning October 1, 1977. If, for the ad valorem tax year beginning October 1, 1978, the receipts from any ad valorem tax with respect to which any millage rate has been increased pursuant to the immediately preceding sentence are less than 95 percent of the receipts from such ad valorem tax for the ad valorem tax year beginning October 1, 1977, then at any time not later than September 30, 1980, the taxing authority may increase any millage rate with respect to such ad valorem tax in the manner provided in the immediately preceding sentence, such increase to be effective for ad valorem tax years beginning on and after October 1, 1979. It is further provided that all millage adjustments shall be made in increments of not less than one tenth (1/10) mill.

(f) On and after October 1, 1979, any county, municipality or other taxing authority may at any time increase the rate at which any ad valorem tax is levied above the limit otherwise provided in this Constitution; provided, that the proposed increase to be made pursuant to this subsection shall have been (1) proposed by the governing body of the taxing authority after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors residing in the taxing authority who vote on the proposal at a special election called and held in accordance with the law governing special elections. Any adjustments or other actions authorized to be made or taken pursuant to this

subsection and subsection (e) hereof shall be made or taken by resolution of the governing body of such taxing authority, or if there is no such governing body and in the case of a taxing authority other than a municipality, by resolution of the governing body of the county in which such taxing authority is located acting on behalf of such taxing authority. The provisions of subsections (c), (e) and (f) of this section shall not apply to ad valorem taxes levied by the state.

(g) The legislature is authorized to enact legislation to implement the provisions of this section and may provide for exemptions from taxation; provided, that unless otherwise expressly provided, no amendment to this section shall be construed to repeal any statutory exemption existing on the effective date of any such amendment hereto.

(h) Wherever any constitutional provision or statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes, such provision shall mean as assessed for county or municipal taxes, as the case may be.

(i) Except as otherwise provided in this Constitution, including any amendment thereto whenever adopted with respect to taxable property located in the city of Mountain Brook, the city of Vestavia Hills, or the city of Huntsville, the amount of ad valorem taxes payable to the state and to all counties, municipalities and other taxing authorities with respect to any item of taxable property described as Class I property shall never exceed 2 percent of the fair and reasonable market value of such taxable property in

any one ad valorem tax year, such amount with respect to any item of Class II property shall never exceed 1½ percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year, such amount with respect to any item of Class IV property shall never exceed 1¼ percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year, and such amount with respect to any item of Class III property shall never exceed 1 percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year. Whenever the total amount of ad valorem property taxes otherwise payable by any taxpayer with respect to any item of taxable property shall exceed in any one ad valorem tax year the maximum amount of such taxes permitted by this section, such amount of taxes shall be reduced by subtracting that amount of tax due that is in excess of the amount of tax otherwise permissible under the Constitution. In connection with the taxation of any item of taxable property, the amount of tax to be subtracted with respect to each authority levying and collecting any ad valorem property tax shall be in the same proportion to the total amount of tax to be subtracted that the total number of mills on each dollar of taxable property situated in the taxing authority levied by such taxing authority bears to the total number of mills on each dollar of taxable property situated in the taxing authority levied by all taxing authorities with respect to such item of taxable property. Before sending to any taxpayer any notice relating to the collection of ad valorem taxes, the tax collector in each county shall determine whether any portion of the amount of ad valorem property tax otherwise due with respect to any item of taxable property shall be subtracted pursuant to the provisions of this subsection and shall apportion the amount to be

subtracted in accordance with the provisions of this subsection.

(j) Notwithstanding any other provision of this section, on and after October 1, 1978, taxable property defined in subsection (a) hereof as Class III property shall, upon application by the owner of such property, be assessed at the ratio of assessed value to the current use value of such taxable property and not the fair and reasonable market value of such property. The legislature may enact laws uniformly applicable to the state and all counties, municipalities and other taxing authorities establishing criteria and procedures for the determination of the current use value of any eligible taxable property and procedures for qualifying such property for assessment at its current use value. The legislature may also enact laws uniformly applicable to the state and all counties, municipalities and other taxing authorities providing for the ad valorem taxation of any taxable property ceasing to qualify for current use valuation; provided, however, that any additional tax on taxable property ceasing to qualify for current use valuation shall not apply to more than the three ad valorem tax years immediately preceding such cessation of qualification (including as one such year the year in which cessation of qualification occurs).

(k) The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities and property devoted exclusively to religious, educational or charitable purposes, household and kitchen furniture, all farm tractors, all farming implements when used exclusively in connection with agricultural property and all stocks of goods, wares and merchandise.

(l) Notwithstanding the other provisions of this section, with respect to the costs of reappraisal incident to the state-wide reappraisal of property heretofore authorized by the legislature, each county, municipality or other taxing authority for ad valorem tax years beginning on and after October 1, 1978, may impose and levy an additional ad valorem tax of not more than two mills on all taxable property located in the taxing authority in order to reimburse itself for its payment of such costs of reappraisal or to pay any unpaid costs or its pro rata share of such unpaid costs of reappraisal. The taxes provided for in this subsection, or any pro rata part thereof, shall terminate at the end of the ad valorem tax year in which sufficient funds are received from the taxes to pay in full the said reappraisal costs and any receipts from such taxes that are received during the ad valorem tax year of their termination that are not needed for the purposes specified herein may be used by the taxing authority levying the tax for general purposes of the taxing authority. The taxes authorized in this subsection shall not exceed in the aggregate, with respect to any item of taxable property located in the taxing authority, a total of two mills for all such taxes levied by all taxing authorities in a county and not two mills for each taxing authority in a county. If more than one such taxing authority in a county has paid or owes all or a portion of its reappraisal costs, such two mills shall be prorated among such taxing authorities in the county as they may agree, or if they cannot agree, in the percentage which each such taxing authority's costs of reappraisal bear to the total costs of reappraisal of all taxing authorities in the county. The provisions of this subsection shall apply only to the costs incurred by a taxing authority incident to the state-wide reappraisal of property heretofore authorized by the legislature, the

amount of which costs shall be certified by the department of revenue, and shall not be applicable to any future reappraisals that may be required by law.

(m) If any portion of this section should be declared invalid by any court of competent jurisdiction, such invalidity shall not affect the validity of any of the remaining portions of this section, which shall continue effective.

No. 06-1428

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN F. KNIGHT, JR., and
ALEASE S. SIMS, ET AL.,

Petitioners,

v.

THE STATE OF ALABAMA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether, on this record, the lower courts abused their discretion in declining to invalidate certain Alabama tax provisions after those same courts had already ordered numerous other forms of relief over a period of more than 20 years specifically to remove vestiges of racial segregation from Alabama's system of higher education?

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STATEMENT OF THE CASE

A. Tax Policies of the State of Alabama

Alabama funds public education, including higher education, primarily through income and sales taxes. App. 17, n. 16. Other states meet funding requirements in various ways; for example, some states have no income tax, and some have no sales tax. App. 17, n. 16. While not a principal source, property taxes do provide some revenue for education in Alabama, and legal limitations do result in relatively low property taxes in Alabama. App. 17-18. But throughout the history of this case, including this petition, there has been no evidence to show that an order invalidating Alabama's restrictions on property tax rates would result in increased tax rates, increased tax revenues, or, most importantly, increased funding of higher education, let alone that such invalidation would result in the removal of the alleged vestiges of segregation in Alabama's institutions of higher education.

B. The Current Action

On July 28, 2003, after remedial decrees had been implemented for many years, petitioners filed a Motion for Additional Relief seeking a declaratory judgment that certain provisions of the Alabama Constitution restricting the amount of ad valorem taxes imposed on property owners violated the United States Constitution, and, in addition, an injunction against enforcement of those provisions. App. 32-33. After an evidentiary hearing, United States District Judge Harold L. Murphy, who had been responsible for the case for nearly two full decades, denied the motion. On appeal, the Eleventh Circuit unanimously affirmed Judge Murphy's decision. The

opinion of Judge Hill, with whom Chief Judge Edmondson and Judge Kravitch joined, was released on January 31, 2007. App. 1.

C. Removal of Vestiges of Segregation Under Consent Decrees

No one disputes that the State of Alabama has "unbegrudgingly complied" with all decrees in this case. App. 6. During the more than twenty years' worth of remedial decrees, the State has appropriated $179 million in new funds for Alabama's historically black universities. App. 22. During the same remedial period, total undergraduate or graduate degrees awarded to black students have increased 96.43%, while white students' graduation rates have actually dropped 13.36%. App. 22. Additional settlement agreements approved by the district court in December of 2006 add additional millions of dollars of funding, such as an additional $7.3 million for Alabama State University's capital needs, an additional $25.8 million for Alabama A & M University's capital needs, up to $2 million per year through the 2010-2011 academic year for diversity scholarships, and $10 million for the Alabama Student Assistance Program. *See Knight v. Alabama*, 469 F. Supp. 2d 1016, 1040 (N. D. Ala. 2006), and Exhibit A to the Order and Final Judgment.

During the life of these remedial decrees calculated to eliminate vestiges of historical discrimination within the Alabama higher education system, Judge Murphy retained active jurisdiction over the case. *Id.* at 1021. He required the parties to provide voluminous annual reports detailing the racial composition of the students enrolled at Alabama institutions of higher education and other statistical data.

Id. After some years, Judge Murphy appointed an oversight committee consisting of nationally known educational leaders to oversee administration of court-ordered remedies, and Judge Murphy himself conducted periodic reviews of the effectiveness of its decrees. At the settlement hearing, one of the class representatives, John Knight, agreed that the State of Alabama had complied with the terms of the remedial decrees. *Id.* at 1026. No one has ever complained that the State has been unable to provide the resources required by the remedial decree (i.e., the resources necessary to eradicate the vestiges of *de jure* segregation identified by the district court), because of limited funds or restrictions placed on state property taxes.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners do not allege that the Eleventh Circuit's decision here implicates any split of authority that requires resolution. *See* Sup. Ct. R. 10(a). Nor do petitioners allege that the Eleventh Circuit's decision here implicates a question of national importance. *See R. Stern, E. Gressman, et al., Supreme Court Practice* § 4.2, at 223 (8th ed. 2002) ("The Court has traditionally expended its time and resources on those cases that present issues of national importance . . . "). Petitioners seem to portray the Eleventh Circuit's decision as one that "conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)), but as shown below, it is clear that those decisions are inapposite. The real issue petitioners raise is whether, on this record, the lower courts erred in finding that there was no evidence of causation or redressability. Such a fact-bound request for

what can only be understood as pure error-correction is an insufficient basis for certiorari. *See* Sup. Ct. R. 10.

I. The Petition Should Be Denied Because It Challenges Settled Principles of Law.

Petitioners assert that the district court found a violation of the Equal Protection Clause but "refused to provide any relief." Pet. 7. They are wrong, as evidenced by the extensive relief Judge Murphy has ordered in remedial decrees over nearly two decades including changes in curricula, new programs, and hundreds of millions of dollars in new funds to Alabama's historically black institutions. App. 22. Petitioners cannot seriously contend that the district court refused to provide "any" relief;[1] instead, their contention must be that Judge Murphy, in the exercise of his discretion, declined to award the specific *additional* relief petitioners seek. But that is tantamount to arguing that, once the district court finds that a law was enacted with a discriminatory purpose, it is thereafter legally bound to order whatever relief a plaintiff seeks; in other words, that the court lacks discretion in deciding how to fashion a remedy.

---

[1] Petitioners say that the court of appeals "got wrong other alleged facts" in various ways, including that "diversity scholarships the Court of Appeals refers to did not benefit black students." Pet. 15, n. 2. In fact, the court of appeals never said that diversity scholarships benefited black students. It did say that there were "many financial aid programs benefiting black students" and that minority and diversity scholarships had been added at Alabama's historically black universities. It did not say, though, that the diversity scholarships specifically benefited black students. Moreover, when petitioners say that diversity scholarships did not benefit black students, they seem to ignore a fact they made repeatedly during the course of this litigation – that the increased diversity made possible by such scholarships benefits *all* students.

This contention runs contrary to settled principles established and reiterated in school desegregation cases from *Brown II* to the present. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 300, 75 S. Ct. 753, 756, 99 L. Ed. 1083, 1106 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554, 566 (1971) ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Milliken v. Bradley*, 433 U.S. 267, 288, 97 S. Ct. 2749, 2761, 53 L. Ed. 745, 761 (1977) (nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case."); *Lee v. Anniston City School System*, 737 F.2d 952, 955 (11th Cir. 1984) ("In carrying out its duty to eliminate the vestiges of unlawful desegregation in the school system, the district court has available to it the full panoply of remedial powers. When reviewing a district court's desegregation order, an appellate court is limited to determining whether the court's order was an abuse of discretion, and is bound by the district court's findings of fact unless clearly erroneous.") (internal citations omitted); *Lee v. Macon County Bd. of Educ.*, 970 F.2d 767, 778 (11th Cir. 1992) ("For nearly 30 years, the district court has retained jurisdiction over this case to enforce the mandates of the 1963 desegregation order. The district court's enforcement powers include the full panoply of equitable powers, and we review that court's use of these powers only for abuse of discretion.").

Furthermore, and more specifically, a broadside attack on the legal framework for raising tax revenue like the one

here is a matter especially left to the discretion of the district court, as this Court has noted.

> Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. . . . No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena . . . the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41, 93 S. Ct. 1278, 1301 (1973).

Petitioners have offered nothing to show that Judge Murphy – who has lived with this case for two decades – abused his discretion in fashioning appropriate relief here. To the contrary, their argument is that a federal court "may not decline to grant any relief." Pet. 16. The petition should be denied because, first, Judge Murphy has ordered extensive relief over the course of many years, and, second, because the relief ordered was manifestly within Judge Murphy's discretion.

II. The Petition Should Be Denied Because, On This Record, There Has Been No Showing of Causation or Redressability.

The lower courts found that there was no causal link between the challenged property tax provisions and any

segregative effect in higher education or otherwise. App. 15-16. Petitioners have done nothing to challenge that finding before this Court. Numerous decisions of this Court, moreover, make clear that injury and causation are not mere formalities, but rather are critical elements in determining whether petitioners' claims are cognizable under Article III of the United States Constitution.

Petitioners argue, essentially, that Alabama's property tax structure affects higher education by causing Alabama's entire education budget, including K-12 education, to be underfunded. This underfunding, they argue, causes K-12 and higher education to compete for revenue, with the result that there is less money to fund programs and scholarships in higher education. Judge Murphy, who, given his experience, knows this case inside and out, considered this argument and expressly found that any causal connection between the challenged tax provisions and segregative effect involving higher education was too speculative and attenuated to warrant relief. App. 97-98, App. 106. Judge Murphy also found that the relief sought by petitioners, essentially an injunction against enforcement of the challenged property tax provisions, would not necessarily result in any increased revenue or, if revenue were increased, that any of it would go to K-12 schools or Alabama's colleges and universities. Moreover, Judge Murphy eventually found that his previous orders had removed the vestiges of segregation from Alabama's system of higher education to the extent practicable and consistent with sound educational principles. *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1028 (N.D. Ala. 2006).

It is true, of course, that the lower courts found that the challenged property tax provisions were traceable to an unfortunate era of Alabama's history when segregationist

policies were ascendant. Following *United States v. Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992), Judge Murphy thus shifted the burden of proof to the State to prove that the provisions no longer had a segregative effect. Judge Murphy took live testimony in a two-day evidentiary hearing and expressly found that the State had met its burden of proof, and that the challenged provisions did not have a continuing segregative effect. In affirming his decision, the Eleventh Circuit echoed Judge Murphy's reasoning when it wrote that "there are simply far too many links in this chain to permit us to infer that Alabama's method of funding its K-12 education causes, in any meaningful way, the continuing segregation of its colleges and universities." App. 15.

The court of appeals observed that "[m]any other public programs," including transportation, public safety, public health, and a host of others, "compete for the Alabama tax dollar." *Id.* Accordingly, there is no way to predict whether increased revenues would result in increased funding for higher education or something else. Even if Alabama's property tax laws were enjoined, it is speculative, at best, whether new laws would be enacted to raise taxes. Indeed, the Eleventh Circuit noted that in 2003 Alabama voters overwhelmingly rejected a plan to overhaul the state's income and property tax system, suggesting that Alabamians would be unwilling to raise property tax rates. App. 15. The court of appeals further noted that petitioners had failed to show that the relief requested would actually result in increased revenue, emphasizing that the petitioners' "attenuated" chain of causation failed to consider the possibility that raising taxes might result in business flight, which in turn could result in *lower* tax revenues. App. 16.

These factual findings show that the district court would have abused its discretion, and exceeded the scope of its remedial powers, if it had proceeded to use this case to fundamentally rework Alabama's property tax system. In *Missouri v. Jenkins*, 505 U.S. 70, 115 S. Ct. 2038 (1995), this Court reversed a district court's remedial decree that included salary increases for faculty in the Kansas City Municipal School District where the goal was "desegregative attractiveness." *Id.* at 100, 115 S. Ct. at 2055 (1995). This Court explained that such a goal entailed "so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court." *Id.*

Finally, the district court's remedial decrees, including funding orders and establishment of need-based scholarships, have addressed the effects of funding disparities in Alabama's higher education system and have served to break whatever weak or "attenuated" connection may have existed between the challenged provisions of the law and any segregative effect.

Given that evidence of causation is absent from this case, petitioners' reliance on *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315 (1984), is inexplicable. In *Allen*, this Court held that a constitutional challenge to tax exemptions for allegedly discriminatory private schools was barred by the plaintiffs' failure to demonstrate, among other things, that the tax exemptions had a segregative effect on the public schools attended by the plaintiffs. In fact, describing the issue as one of constitutional standing, this Court in *Allen* used language very similar to that used by the lower courts in this case:

> The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is *attenuated at best*.

Id. at 758 (emphasis added). Given the lower courts' holdings that the petitioners' theory of causation here, too, is "attenuated," *Allen* requires denial of the petition.

In *Allen*, this Court relied on several earlier cases in which plaintiffs' failure to prove causation, or a related failure to prove that the requested relief would result in redress of their alleged injury, amounted to a lack of standing. In one of those cases, *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975), the plaintiffs sought removal of zoning restrictions that were alleged to maintain the existence of racially segregated neighborhoods. *Id.* at 495-96. The plaintiffs were unable to show, however, that there was a causal relationship between the zoning ordinances and the settlement patterns. To the contrary, they relied on "little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief." *Id.* at 507. Consequently, there was "no actionable causal relationship between [the city's] zoning practices and petitioners' asserted injury." *Id.*; *see also Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917 (1976) (injury must result from the challenged action, and relief from the injury must be likely to follow from a favorable decision). Petitioners' dogged reliance on "but-for" causation misses the point: Judge Murphy found, and the Eleventh Circuit agreed, that an injunction against the tax provisions at issue is unlikely to have any effect on funding for higher

education in Alabama. App. 23. ("[T]he challenged tax policies have not undermined that desegregative process to a level that even remotely triggers the United States Constitution.").

The petitioners' reliance on *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985), is likewise misplaced. *Underwood* involved Alabama's allegedly racially discriminatory law disenfranchising persons convicted of certain crimes. Causation and redressability were not issues in *Underwood*, because disenfranchisement, unlike an entire system of taxation, is a status that can be easily and completely redressed with a court order. *Underwood* involves a completely different situation from that presented here, where the claims of discrimination have been carefully and comprehensively addressed over a 20-year period and will continue to be remedied under existing consent decrees.

Petitioners' reliance on *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969), is equally misplaced. In *Erickson*, the City of Akron had adopted an ordinance for the purpose of restricting minorities' access to governmental procedures for remedying housing discrimination, resulting in "special burdens on minorities within the governmental process." *Erickson*, 393 U.S. at 391. Because the ordinance was clearly the cause of the "special burdens," the injury was completely redressed by enjoining the ordinance. Causation and redressability, therefore, were not at issue. In this case, by contrast, where the effect of enjoining or invalidating certain tax provisions is not only unknown, but unknowable, it cannot be said that any remedial, desegregative effect would result.

In short, *Erickson* and *Underwood* involve situations in which an order enjoining enforcement of certain statutes provided complete relief to victims of discrimination. They are not desegregation cases, do not involve remedial decrees, and do not involve the issue of the removal of segregative effects through remedial decrees.

CONCLUSION

The petition for writ of certiorari should be denied.

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INTRODUCTION

Respondents argue that the petition for writ of certiorari should not be granted because it presents only "fact-bound" questions that are not of "national importance." Br. in Opp. 3-4. To begin with, respondents mischaracterize the issues presented by the petition as an attack on findings below that there was "no evidence of causation or redressability." *Id.* at 3. To the contrary, the petition does not refer to the record of evidence; it relies entirely on the lengthy findings of fact made by the District Court, App. 34-93, and contends that they do not justify conclusions of law 13-17 holding that the causal relationship between the challenged property tax provisions in Alabama's constitution and the unequal educational opportunities for African Americans that were the hallmark and purpose of the dual system is too attenuated to satisfy *United States v. Fordice*, 505 U.S. 717 (1992). App. 97-98.[1]

The District Court made findings of fact that the state constitutional limits on property taxes force Alabama's K-12 schools and higher education to share the same Education Trust Fund (ETF) revenues, App. 81-86, that the income taxes and sales taxes that supply the ETF are

[1] In its conclusions of law, when the District Court found there was an attenuated relationship between the tax structure and "school choice," it seemed to restrict the meaning of "school choice" to the choice about *which* college to attend and not the choice *whether* to attend and to complete higher education at any college at all. App. 98-99 n.9. However, when Plaintiffs' motion to alter or amend contended that such a cramped construction of *Fordice* would be legally erroneous, the District Court clarified its ruling and stated that it "reached its conclusion based on the Knight-Sims Plaintiffs' failure to show that the ability of black students to attend college, *or* to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system." App. 107 (emphasis added).

already regressively high and cannot compensate for Alabama's nationally lowest property taxes, App. 69-70, 72, 81, that overall low revenues cripple both K-12 and higher education, App. 72, 96, and that this inadequate funding falls disproportionately on black students,[2] just as the racially motivated drafters of the state constitution intended. App. 72-80, 84, 87-93. The petition further contends that the detailed findings of fact that the tax provisions were racially motivated and still have the intended racially discriminatory effects should have prevented the District Court from "declin[ing]" the class representatives' request to enjoin their future enforcement on grounds that such a prohibitory injunction "is beyond the scope of this litigation." App. 106.

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[2] Respondents refer to data from defendants' 2004 annual report to the court showing black degree completions increasing by 96% from 1991 to 2003, while white degree completions dropped by 13%. Br. in Opp. 2 (citing App. 22). These data merely reflect corresponding changes in census demographics. According to the U.S. Census Bureau, the black population of Alabama in the age 20- to 25-year-old category increased 19.4% between 1990 and 2000, while the white population age 20- to 25-years old declined 7%. http://cber.cba.ua.edu/edata/census2000/cntybyraceadult.prn (last accessed on May 27, 2007). The census further shows that the percentage of black college graduates over 25 years of age increased from 9% in 1990 to 11% in 2000, while white college graduate percentages in the same age group increased even more, from 17% to 21%. U.S. Census Bureau, 1990 Census, Table P058, and U.S. Census Bureau, 2000 Census, Tables P148A and P148B (accessible through http://factfinder.census.gov) (last accessed on May 27, 2007). Of course, for equal protection purposes, the relevant question is the black-white gap, and the District Court found that the black-white enrollment gap actually increased over this period of time. App. 90. As the District Court pointed out, all demographic groups have raised their college graduate numbers because of increases in "what economists call the college wage premium, the difference between a high school graduate, what he or she earns, and a college graduate." App. 92.

Respondents' brief in opposition actually underscores the national importance of the question whether a federal District Court may simply ignore the clear constitutional violation established by its own findings of fact. Subsumed in this question are at least two subsidiary questions suggested by respondents' brief: whether any person may ever successfully challenge as racially discriminatory a state's tax laws, and whether eradication of Jim Crow-era laws that still adversely impact African Americans remains a Constitutional imperative.

I. NEITHER THE RESPONDENTS, THE DISTRICT COURT, NOR THE COURT OF APPEALS CAN JUSTIFY LETTING STAND THE RACIALLY DISCRIMINATORY STATE CONSTITUTIONAL PROVISIONS IDENTIFIED BY THE FINDINGS OF FACT.

The State respondents do not attempt to defend the reasons given by the lower courts for refusing to hold that the specific findings of fact establish a violation of the Fourteenth Amendment. The District Court held that, because it concluded the racially motivated tax provisions did not have continuing "classic" segregative effects on higher education within the meaning of *Fordice*, the traditional equal protection principles of *Hunter v. Underwood*, 471 U.S. 222 (1985), were "inapplicable under the circumstances of this case." App. 106. The Court of Appeals held that Rule 54(c), Fed.R.Civ.P., did not "empower" it or the District Court to enjoin the racially discriminatory tax provisions. App. 19-21 n.19. The petition for writ of certiorari presents the important question whether these reasons can be squared with the plain language of Rule 54(c) and a federal court's duty to order appropriate

relief where the facts clearly establish a constitutional violation. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1979).

Respondents do not address these questions. Instead, they contend that the District Court could refuse to enjoin the racially discriminatory tax provisions as an exercise of its equitable discretion in fashioning a school desegregation remedy. Br. in Opp. 4-6. The problem with this argument is that the District Court held that the challenged state constitutional provisions "do not violate the Fourteenth Amendment." App. 102. It never reached questions of remedy and thus never exercised its remedial discretion.[3] The question of national importance here is whether,

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[3] Respondents wrongly imply that two years after its refusal to enjoin enforcement of these racially discriminatory property tax provisions the District Court included this decision in its final judgment approving settlement agreements and finding that vestiges of segregation in higher education had been eliminated to the extent practicable. Br. in Opp. 7 (*citing Knight v. Alabama*, 469 F.Supp.2d 1016, 1028 (N.D. Ala. 2006)). In fact, this final judgment was made "subject only to final resolution of the claims pending on appeal," 469 F.Supp.2d at 1037, and the settlement agreement between the Knight-Sims plaintiffs and the defendant State includes agreed upon remedy procedures if the property tax issue is remanded at the completion of all appeals. *See* CA No. 2:83-cv-01676-HLM (N.D. Ala.), Doc. 3469, pp. 19-20 (see pp. 12, 15-16 in the appendix to this reply brief).

Respondents also wrongly allege that the $10 million in need-based financial aid included in the settlement agreement has "served to break" any causal connection between the state constitutional property tax restrictions and their discriminatory effects. Br. in Opp. 9. In fact, the $10 million is only a one-time appropriation by the State, which has expressly refused to commit to continuing financial aid appropriations that the plaintiffs are left to pursue through the legislative process. CA No. 2:83-cv-01676-HLM (N.D. Ala.), Doc. 3469, p. 7 (pp. 4-5 in the appendix to this brief). Whether this Court grants the petition for writ of certiorari and reverses the decisions below may well determine whether there are sufficient future revenues to sustain and increase

(Continued on following page)

once they have made such damning fact findings, federal courts can evade their responsibility to declare a violation of the equal protection rights of the certified class of all black citizens of Alabama.

II. RESPONDENTS' READING OF THE DECISIONS BELOW SUGGESTS THAT THE REQUIREMENTS OF CAUSATION AND REDRESSABILITY WOULD BAR ANY FUTURE CHALLENGES TO THE RACIALLY DISCRIMINATORY PROPERTY TAX PROVISIONS IN ANOTHER CIVIL ACTION.

The State contends that this desegregation action is an inappropriate vehicle to secure relief from the racially discriminatory tax provisions in Alabama's 1901 constitution, and implies that black citizens who would benefit more directly from increased property tax revenues should bring a new lawsuit. At the same time, the State suggests that the rationale of the Court of Appeals, in particular regarding causation and redressability, arguably immunizes those tax provisions from any future attack. The State points out the difficulties other plaintiffs would have showing that an injunction against enforcement of the

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this modest financial aid appropriation that is well below the national average.

It is particularly disturbing that respondents have included these misleading representations in their brief in opposition to the instant petition when they successfully opposed petitioners' motion to supplement the record in the Court of Appeals with the District Court's final judgment and settlement agreements, on the ground that these matters were not before the District Court when it entered its 2004 ruling on the property tax issues. See docket entries for January 29, 2007, in Appeal no. 05-11527-BB (11th Cir.).

state constitutional restrictions on ad valorem taxes could result in higher revenues from taxes overall or could increase funding for "transportation, public safety, public health, . . . higher education *or something else*." Br. in Opp. 8 (emphasis added). What the state legislature might do in the future, they say, is "speculative, at best. . . ." *Id.* Because of these uncertainties, respondents suggest, any other black plaintiffs might not have Article III standing to assert "cognizable" claims against the racially discriminatory revenue provisions. *Id.* at 7. In short, if the decisions below are left standing, the State of Alabama can be expected to contend that these remnants of the dual system of education for blacks and whites are simply immune from judicial attack.[4]

Indeed, it will be hard for black plaintiffs in another lawsuit to improve on the specific findings of fact in the instant case. Respondents cannot deny that these findings of fact establish a direct line of causation between the challenged state constitutional provisions and the discriminatory financial burdens that fall disproportionately on black students in Alabama's system of public education, from kindergarten to graduate school. The provisions' adverse racial impact is not caused by private actors, as was the case in *Allen v. Wright*, 468 U.S. 737 (1984), but by the state action itself.

Respondents' primary contention is that a simple prohibitory injunction against future enforcement of the state constitutional tax restrictions would not redress any

[4] As the Court of Appeals noted, the Alabama Supreme Court has barred state courts from getting involved in challenges to the adequacy of funding for public education. App. 12 (*citing Ex parte James*, 836 So.2d 813, 816 (Ala. 2002)).

injury suffered by black Alabamians because the legislative response to such an injunction is unpredictable. But they do not dispute that removing the state constitutional barriers to the legislature addressing property tax reform in a plenary fashion is precisely what the white supremacist drafters of the Alabama constitution did not want to occur.[5] That is the root injury that would be remedied by the prohibitory injunction petitioners are seeking. In this respect, the instant action is no different than *Hunter v. Underwood*, where this Court's ruling striking from Alabama's 1901 constitution certain racially motivated provisions disfranchising misdemeanants provided no guarantee that the legislature would not re-enact them as statute law or propose them again to voters for inclusion in the constitution. *E.g., see Johnson v. Governor of Florida*, 405 F.3d 1214, 1223 (11th Cir.), *cert. denied*, 126 S.Ct. 650 (2005) (re-enactment of felon disfranchisement provision in Florida's 1968 constitution removed taint of racially motivated provision in the 1868 state constitution). Indeed, the same uncertainty about future legislative action inheres in every judicial order declaring a state law

[5] Respondents point to the 2003 referendum election cited by the Court of Appeals, App. 15, as "suggesting that Alabamians would be unwilling to raise property tax rates." Br. in Opp. 8. But they fail to point out the District Court's findings of fact that the voter referendum requirement for increasing property taxes was placed in the 1901 constitution for the racially discriminatory purpose of giving white voter majorities power to control all property tax increases and to provide "an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties." App. 43-44. That is precisely what happened in 2003, where all nine of Alabama's majority-black counties, all of them located in the Black Belt, were among the thirteen counties which voted to adopt the constitutional property tax amendments in 2003. See http://www.sos.state.al.us/election/2003/scae/results.cfm (last accessed on May 29, 2007).

unconstitutional because of its racially discriminatory intent. Contrary to respondents' assertion, Br. in Opp. 11, the injunction in *Hunter v. Erickson*, 393 U.S. 385 (1969), against enforcement of a city charter amendment barring enactment through the ordinary lawmaking process of measures favoring the racial minority, without prior approval of a majority white electorate, did not ensure that the Akron City Council subsequently would adopt a fair housing ordinance. The District Court's attempt to distinguish *Hunter v. Erickson* from the instant case is simply mistaken. App. 100.

III. REMOVING INEQUALITY IMPOSED BY THE OFFICIAL REGIMES OF SLAVERY AND SEGREGATION IS OF HIGHEST NATIONAL IMPORTANCE.

Respondents do not contest the District Court's extensive findings of fact tracing the challenged state constitutional provisions to purposeful racial discrimination against former slaves and their descendants. They contend that whether these legal remnants of "an unfortunate era of Alabama's history" remain on the books is no longer of national importance. Br. in Opp. 7-8. Surely they are wrong, as this Court has often reminded us. *E.g., Palmer v. Thompson*, 403 U.S. 217, 220 (1971) ("History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well. *See, e.g., Slaughter-House Cases*, 16 Wall. 36, 71-72, 21 L.Ed. 394 (1873). Thus the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States.").

As the District Court found, these racially discriminatory provisions in the 1901 Alabama constitution, by disproportionately restricting financial access for blacks to all levels of the state's system of public education, will continue to have their intended effect of "forcing African Americans into subordinate social and economic roles in the state's civil life," App. 91-92. The national importance of the issues presented by the petition could not be greater. By refusing to enjoin enforcement of these restrictions on the revenues that are the traditional source of funding for public education throughout the United States, the courts below lost sight of the crucial role federal courts must play in ending this country's "unfortunate era" of racial segregation, a task described eloquently in the District Court's 1991 opinion:

> The history of black higher education in Alabama following the Civil War is not atypical. Strict white control was the hallmark of black higher education in the state until the 1970's. For many years blacks were effectively denied the benefits of a collegiate education by the operation of two interrelated practices: the uncompromising segregation of the state's white institutions and the limited educational mission assigned to the state's black colleges. Concomitant to these two practices, there arose a host of policies and laws designed to institutionalize segregation while assuring the inferior status of black education. The case at bar is[,] in large measure, about identifying and eliminating those segregative policies and practices which survived federally mandated integration.
>
> These surviving policies and practices, referred to as vestiges of the *de jure* period of segregation, must be abolished root and branch if

> the mandate of the Constitution is to be satisfied. The obligation of the Court is to ensure that a student is free to choose any institution of higher education in Alabama unencumbered by the segregative practices which arose during the period of *de jure* discrimination.

Knight v. Alabama, 787 F.Supp. 1030, 1046 (N.D. Ala. 1991), *aff'd in relevant part,* 14 F.3d 1534 (11th Cir. 1994). Why the meticulous findings of fact made by the District Court in this matter do not trigger this solemn obligation is the issue that deserves careful review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., and **ALEASE S. SIMS**, et al., individually and on behalf of others similarly situated,	*	Civil Action No. 2:83-cv-1676-HLM
Plaintiffs and Plaintiffs-Intervenors,	*	
UNITED STATES OF AMERICA,	*	
Plaintiff-Intervenor,	*	
v.	*	
THE STATE OF ALABAMA, et al.,	*	
Defendants.	*	

SETTLEMENT AGREEMENT

(Filed Oct. 13, 2006)

This Settlement Agreement ("Agreement") is made by the following Settling Parties:

The Knight-Sims Plaintiffs; to wit, John F. Knight, Jr., and Alease Sims, et al., on behalf of themselves and the plaintiff class certified in this action as "all black citizens of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University and Alabama A&M University;"

The State Defendants; to wit, the State of Alabama, the Governor of Alabama, the State Finance Director, the Alabama Commission on Higher Education ("ACHE") and its members, and the Alabama Public School and College Authority and its members.

I

Guiding Principles

Removing the vestiges of segregation from Alabama's system of public higher education is the Pole Star that has guided the Settling Parties for the almost twenty-six years of this litigation. During that period, profound progress in attitudes, organization, and programs has been achieved. The State Defendants have complied with all remedial orders issued by the Court, resulting in the creation of new academic programs, diversity scholarships and endowment trusts and the construction of new facilities at Alabama State University and Alabama A&M University, the funding of efforts to increase African-American representation on the faculties and administrations of the historically white universities, and the allocation to date of over $248 million to implement these desegregation measures. The Settling Parties agree that this progress should continue. The Settling Parties further agree that continued progress does not depend on continued federal court supervision. The Settling Parties are prepared to show the nation and the citizens of Alabama that the elimination of discrimination in our society is a goal to which the Settling Parties are dedicated. It is in this spirit that the Settling Parties have reached this Agreement.

Applicable desegregation law requires the Court to determine that vestiges of segregation have been eliminated to the extent practicable and consistent with sound educational practices. By entering into this Agreement, the Knight-Sims Plaintiffs acknowledge that the State Defendants have satisfied this legal burden. Similarly, by entering into this Agreement, the State Defendants pledge to continue those efforts that, over the course of this litigation, redressed historical discrimination in higher

education against African-American citizens of this state. To that end, this Agreement's primary focus is on continuing to improve African American access to and participation in Alabama's system of public higher education.

The Governor, in his capacity as chief executive officer, and the Attorney General, in his capacity as chief legal officer, execute this Agreement on behalf of the State of Alabama and affirm their willingness to seek full implementation of the Agreement. As emphasized in section XIII below, the Agreement is subject to the approval of the District Court.

II

NEED-BASED FINANCIAL AID

1. A major priority of this Agreement is to raise the African-American entry rates to college, to narrow the gap between the rates at which African-American and white high school graduates enter college, graduate, and pursue graduate and first professional studies, and to increase access to higher education for all citizens of Alabama.

2. To that end, ACHE will alter the maximum grant allowed under the existing Alabama Student Assistance Program ("ASAP") from $2,500 per academic year to $5,000 per academic year, effective beginning Fall 2007 academic term. The term academic year will be as defined by the Administrative Procedures for the Alabama Student Assistance Program of the Alabama Commission on Higher Education.

3. Additionally, immediately upon final approval of this Agreement, the State Finance Director will transfer to the ASAP account $10,000,000.00 from the funds

sequestered by the order entered September 29, 2006, which will be used as follows:

a. ACHE may use an appropriate amount to cover costs relating to its administration of the ASAP program;

b. The distribution method of these funds and any other funds in ASAP will be in accord with Chapter 300-4-2, Alabama Student Assistance Program. The parties agree that this requirement does not, however, restrict the power of ACHE to amend this Chapter, through appropriate procedures, during the term of this Agreement.

c. The use of these funds must follow the normal procedures as established by the Alabama Commission on Higher Education. Institutions wishing to qualify for these funds must submit the required documentation no later than March 31, 2007. Distribution of these funds will start no earlier than the fall 2007 term.

d. In his budget recommendation to the Legislature, the Governor will request that the Legislature provide that these funds will not revert to the Education Trust Fund at the end of each fiscal year but shall be carried over in ASAP in subsequent years.

e. The $10,000,000 transfer shall be over and above any other funds ACHE currently receives for ASAP.

f. It is the Plaintiffs' intention through the legislative process to support future appropriations to ASAP with the goal of increasing it beyond $10 million, in amounts that will

continue substantially to reduce the cost of attending Alabama's public institutions of higher education for Alabama residents who qualify for federal need-based financial assistance but who still have unmet financial need. The State defendants support in general the goal of reducing financial barriers to access to higher education. However, they have made no binding commitment to continuing or increasing the financial aid provided herein.

g. To the extent reimbursements to Alabama State University and Alabama A&M University for Diversity Scholarships awarded to students "grandfathered" in the Diversity Scholarship program, as provided in Section III, below, for academic years during the term of this agreement fall below $2,000,000, the amount by which those reimbursements fall below $2,000,000 shall be transferred from the appropriation for *Knight v. State of Alabama* obligations to ASAP. As the amount of the transfer may not be known until late in the fiscal year, in his budget recommendation to the Legislature, the Governor will ask the Legislature to provide that the funds will not revert to the Education Trust Fund at the end of the fiscal year but shall be carried over in ASAP in the next fiscal year.

4. As and to the extent such information shall become available to ACHE, ACHE shall post on its website the following:

a. The average cost of attending public universities and postsecondary institutions in Alabama;

b. The total amount of Pell grants awarded to students at institutions of higher education in Alabama;

c. The amount of need-based financial aid awarded to students through the ASAP program, disaggregated by institution and by the number of students receiving ASAP financial aid;

d. A comparison of state need-based financial aid provided in Alabama with regional and national financial aid data, as available.

III

Diversity Scholarship Programs

Students for whom Alabama State University and Alabama A&M University were reimbursed for Diversity Scholarships awarded in academic year 2004-05 will be "grandfathered" as specified herein. Such reimbursements may continue for the term of this Settlement Agreement to the extent the "grandfathered" students remain enrolled at the same academic level (i.e., undergraduate, masters, or doctoral) as in academic year 2004-05. To the extent those students are awarded Diversity Scholarships by their institution in future academic years, to the extent those students remain at the same academic level as in 2004-05, and to the extent those scholarship awards would otherwise qualify for reimbursement by the State under the terms of the Remedial Decree, 900 F.Supp. at 356-8, the State shall reimburse the institutions for the scholarships awarded. Any claim by an institution for such reimbursement shall be submitted within 30 days of the completion of the academic term for which reimbursement is sought, with the following exceptions:

A. Claims for reimbursement for scholarships awarded in academic year 2005-06 shall be submitted within 30 days of the court's approval of this Agreement; and,

B. Claims for reimbursement for scholarships awarded during a summer term shall be submitted prior to September 1 of the year in which the scholarships were awarded. It is anticipated that the State's reimbursements for the Diversity Scholarship programs will be phased out during the term of this Agreement and that the State will have no obligation to reimburse any institution for Diversity Scholarships awarded after the termination of this Agreement, even if students have failed to achieve their degree by that date.

IV

Trusts for Educational Excellence

The State of Alabama will continue to fund the Trusts for Educational Excellence established by the Remedial Decree under the terms and for the duration established by the Decree, 900 F.Supp. at 349-356.

V

Programs Established by the Remedial Decree

To the extent continued funding of programs established at ASU pursuant to the Remedial Decree, 900 F.Supp. at 370-72, is required under existing Court order, the State will continue the separate line items to fund those programs as specified under those orders, for the duration of the period specified by the orders. At the end of the Court-ordered period of funding, those expiring line

items for programs listed in the "Knight v. Alabama – Financial Obligations" section of the Education Trust Fund Act will be rolled into ASU's base O&M appropriation for the fiscal year following the end of court-ordered funding, provided the program meets the post-implementation requirements.

For those funds in the Alabama State University, Board of Trustees section of the Education Trust Fund act identified as Title VI Program Enhancement Funds and Title VI Desegregation Planning funds, (hereinafter "Title VI Funds"), it is the intention of the Governor and the Knight Plaintiffs to support before the Legislature the inclusion of these Title VI Funds in ASU's O&M base during the fiscal year immediately following the end of the Court-ordered period of funding. The Legislature will retain its discretion to appropriate, or not appropriate, the Title VI Funds as part of ASU's O&M base. The Governor and the Knight Plaintiffs agree, however, that the inclusion of the Title VI Funds in ASU's O&M base will be important to the continued viability of the programs, provided the programs are meeting their post-implementation requirements. If, however, at the time the Court-ordered period of funding ends, a program fails to meet its post-implementation requirements, then there is no obligation to support before the Legislature the inclusion of the Title VI Funds for that program in ASU's O&M base.

The parties acknowledge that the Governor may veto any legislation, for reasons other than its inclusion of an appropriation to satisfy this paragraph, without being in breach of this Agreement. The request and support required of the Governor in this paragraph V is not intended to bind the Legislature in any respect, as such might

violate the separation of powers between the Executive and Legislative branches of government.

VI

Capital Funds for Alabama A&M University

Immediately upon final approval of this Agreement, the State Finance Director will transfer to the Alabama Public School and College Authority, for the benefit of Alabama A&M University, $7,300,000.00 from the funds sequestered by the order entered September 29, 2006. These funds shall be allocated to AAMU, consistent with APSCA guidelines and procedures, to meet existing capital funding needs of the University. This payment shall be over and above any other capital funds the University might receive, separate and apart from this Agreement or this litigation. These funds shall be spent on facilities that are directly related to instruction activities and/or research related to AAMU's historic mission. Within 45 days of transfer of these funds to APSCA, the University will present to the Plaintiffs, the Governor, the Finance Director, and ACHE, a plan for how these funds will be spent and a time-line for such expenditures.

VII

Capital funds for Alabama State University

1. Immediately upon final approval of this Agreement, the State Finance Director will transfer $25,800,000.00 from the funds sequestered by the order entered September 29, 2006, to the Alabama Public School and College Authority, for the benefit of Alabama State University. These funds shall be allocated to ASU, consistent with APSCA guidelines

and procedures, to be used to meet capital funding needs specified in this Court's order entered February 8, 2006. This payment shall be over and above any other capital funds the University might otherwise receive, separate and apart from this Agreement or this litigation. Within 45 days of transfer of these funds to APSCA, the University will present to the Plaintiffs, the Governor, the Finance Director, and ACHE, a plan for how these funds will be spent and a time-line for such expenditures.

VIII

Additional Capital Funds

The Governor has agreed to request and to support in the 2007-08 education budget an appropriation to Alabama State University of an additional $11,890,380.00 to be used to meet capital funding needs specified in this Court's order entered February 8, 2006, and an appropriation to Alabama A&M University of an additional $365,000.00 to be used for the purposes set forth in VI, above. If, however, these additional funds are made available through the Legislature authorizing a capital bond issue for education, then the parties agree that the Governor would not be required to request and support in the 2007-08 education budget an appropriation of these funds to satisfy the Court's order of February 8, 2006, or this Agreement. This appropriation or bond money shall be over and above any other capital funds the Universities might otherwise receive, separate and apart from this Agreement or this litigation. Any funds made available pursuant to this paragraph VIII shall be transferred to APSCA and allocated to the designated institutions consistent with APSCA guidelines and procedures. The parties acknowledge that the Governor may veto any

legislation, for reasons other than its inclusion of an appropriation to satisfy this paragraph, without being in breach of this Agreement. The request and support required of the Governor in this paragraph VIII is not intended to bind the Legislature in any respect, as such might violate the separation of powers between the Executive and Legislative branches of government.

IX

Dismissal of Appeal of Order of February 8, 2006

Upon final approval of this Agreement, the Settling Parties shall jointly file with the Court of Appeals a motion to dismiss the pending appeal and cross-appeal from this Court's order entered February 8, 2006.

X

Attorneys' Fees and Litigation Expenses

1. Immediately upon final approval of this Agreement, the State Finance Director will pay plaintiffs' attorneys' fees in the amount of $1,000,000.00 from the funds sequestered by the order entered September 29, 2006. Payment shall be made to James U. Blacksher, who shall be responsible for distribution of the fees to other plaintiffs' counsel.

2. Immediately upon final approval of this Agreement, the State Finance Director will pay into the registry of this Court $1,500,000.00 from the funds sequestered by the order entered September 29, 2006, as additional litigation expenses, which shall be disbursed as the Court may order.

3. The payments for attorneys fees and expenses made pursuant to this Section X shall be in complete satisfaction of any and all claims for fees or expenses by counsel for plaintiffs in this action and any appeals therefrom, except for the claims that will be severed from this action pursuant to Section XI.

XI

The parties have agreed that the issues pending resolution of the Knight-Sims plaintiffs' appeal from this Court's orders of October 5, 2004, and February 10, 2005, should be severed from this action on the following conditions that will pertain in the event said orders are reversed or vacated on appeal and remanded for further action by this Court:

The Knight-Sims plaintiffs have agreed that, to the extent any appellate mandate permits them to do so, they will seek only prospective relief; that is, they will ask the Court only to enjoin future enforcement of sections 214, 215, 216, 269 and amendments 325 and 373 of the Constitution of Alabama and the statutes that implement these constitutional provisions. Plaintiffs will ask the Court to defer entry of said prohibitory injunction for a reasonable period to allow State government the opportunity to enact replacement legislation and/or constitutional provisions. Plaintiffs will not ask the Court to invalidate any tax enacted prior to the ruling of the Appellate Court or to enjoin the imposition or collection of taxes thereunder.

XII

Matters Excepted from this Agreement

The Settling Parties agree that the following matters are excepted from this agreement and from dismissal of this action, as requested in Section XIII hereof:

Issues relating to African-American staff, faculty, and administration recruitment, hiring, and retention at HWIs. The Knight-Sims Plaintiffs may raise these issues with the Court and all Settling Parties are free to support or contest such issues and any ruling the Court might make; provided, however, that the Settling Parties agree to the following:

A. Funding to address any such issues should come from funds of the individual institutions, and not from new funds to be provided by the State; and,

B. ACHE should not be required to conduct any studies, fund any conferences, or publish any materials other than materials provided by the institutions in electronic form, which ACHE may publish on its web-site.

Should a ruling of the Court conflict with the agreements expressed in A or B, above, this Agreement shall become null and void, as provided in Section XIII(E) herein. Otherwise, any ruling of the Court on the issues of this paragraph may be appealed and such appeal will not affect the validity of this Agreement.

XIII

Dismissal of Action and Settlement Implementation

A. Preliminary Court Approval of Agreement.

Promptly after execution of this Agreement, but in no event later than 10 days after the execution of this Agreement, the parties by joint motion shall submit the Agreement to the District Court requesting that the Court enter an order granting preliminary approval of the Agreement. The District Court shall be requested to direct the giving of notice to the plaintiff class and to schedule a fairness hearing. In the event the Court declines preliminarily to approve the Agreement, or to find the Agreement provides an adequate basis for issuing notice and scheduling a fairness hearing, then the entire Agreement shall become null and void unless the parties promptly agree in writing to other mutually satisfactory settlement provisions and agree to proceed with the Agreement, subject to approval by the Court.

B. Final Judgment.

At the final hearing on fairness, adequacy, and reasonableness of the settlement as set forth in this Agreement, the parties, and each of them, agree to cooperate in good faith to achieve the expeditious approval of the settlement, and shall request the Court to grant final approval of the Agreement and to enter judgment thereon ("Judgment"). In order to satisfy the requirements of the Agreement, the Judgment must include, by specific statement or by reference to the Agreement to the extent permitted by law and the rules of court, provisions which:

1. Affirm certification of the proceeding as a class action pursuant to Rule 23 of the Fed. R. Civ. P. with the plaintiff class as previously defined by the Court;

2. Find that the notice given to class members satisfied the requirements of both Rule 23, Fed. R. Civ. P, and due process, and that the Court has jurisdiction over the class;

3. Find that the Agreement is fair, adequate, and reasonable in all respects;

4. Find that the class representatives, and all class members, have released all claims, all as set forth in the Agreement;

5. Order that the State shall implement the Settlement Agreement, including providing the funding designated in this Agreement;

6. Incorporate the Agreement within the Judgment to enable the District Court to exercise jurisdiction over any subsequent dispute involving the Agreement;

7. Pursuant to Rule 42(b), Fed. R. Civ. P., sever from this action the claims that are pending resolution of the Knight-Sims plaintiffs' appeal from this Court's orders of October 5, 2004, and February 10, 2005, denying plaintiffs' requests for relief based on said claims and those claims specified in Section XI, hereof;

8. Subject only to final resolution of the severed claims pending on appeal, find that on judicial approval of this Agreement, including the commitments contained herein, the State Defendants shall be in full compliance with the law, and that, therefore, there are

no continuing State policies or practices, or remnants, traceable to *de jure* segregation, with present discriminatory effects which can be eliminated, altered or replaced with educationally sound, feasible and practical alternatives or remedial measures; and, further, that this finding shall extend to all facets of the case and to all facets of public higher education in Alabama;

9. Subject only to final resolution of the claims pending on appeal, severed, or specified in Section XI, hereof, dismiss on the merits and with prejudice (i) all claims against the State Defendants set forth in the complaint, as amended, (ii) all claims against the State Defendants set forth in the complaint-in-intervention, and (iii) all claims of racial discrimination against the State Defendants asserted before the Court throughout the pendency and trials of the action including, without limitation, claims of system or institutional aspects, features, policies and practices alleged to be remnants of the *de jure* system.

C. Finality and Term of Agreement.

This Agreement shall become final upon the occurrence of the following events: (i) approval of the Agreement in all respects by the District Court as required by Rule 23(e) of the Fed. R. Civ. P.; and (ii) entry of the Judgment as provided for above.

Except where longer periods explicitly are prescribed, the term of the provisions of this agreement shall be from the date this Agreement becomes final until September 30,

2011, at which time this Agreement shall terminate. The Agreement shall be binding upon the successors and assigns of the parties and shall inure to their benefit.

D. Enforcement.

Should any dispute arise regarding a party's compliance with this Agreement, the Parties shall mediate that dispute before Carlos Gonzalez in an effort to reach resolution. Should Mr. Gonzalez not be available to mediate such dispute, the Parties shall select a mediator by mutual consent. All costs of mediation shall be shared equally by the Parties to the dispute. If mediation fails to resolve the dispute to the satisfaction of the Parties, the Parties, including all class members, irrevocably submit to the exclusive jurisdiction of the United States District Court for the Northern District of Alabama any suit, action, proceeding or dispute arising out of or relating to the Agreement (including any alleged nonperformance of the Agreement or the Judgment) or to the applicability of the Agreement. All parties agree that the District Court has complete jurisdiction and power to enforce this Agreement. The parties, agree, however, that they waive any right to seek additional funding or relief not provided in this Agreement. The parties intend by this paragraph to vest the District Court with full jurisdiction for enforcement as contemplated by the case of *Kokkonen v Guardian Life Ins. Co.,* 511 U.S. 375 (1994).

E. Effect of Non-Approval, Cancellation and Termination of Agreement.

If the District Court does not enter an order preliminarily approving settlement, or does not enter the final

Judgment contemplated by this Agreement, then the Agreement shall be automatically canceled and terminated unless the parties hereto otherwise agree at such time.

If the Agreement is not approved or is canceled or terminated, or fails to become effective for any reason, then the parties to the Agreement shall each be deemed to have its or their respective status as of the date and time immediately prior to the Agreement, and the parties shall proceed in all respects as if the Agreement and any related orders had never been executed or entered.

Dated: October 13, 2006,

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